THE
MODERN LAW REVIEW

Volume 22 May 1959 No. 3

MATRIMONIAL PROPERTY—SOME RECENT DEVELOPMENTS

ALMOST a quarter of a century has elapsed since the passing of the Law Reform (Married Women and Tortfeasors) Act of 1935. One of its purposes was to get rid of a number of anomalies in the law of married women's property which had survived previous legislation,[1] and in eliminating these, Parliament gave expression to the principle of the separation of property between husband and wife. That neither spouse acquires by marriage any right in the other spouse's property had been the policy and the broad effect of the Married Women's Property Act, 1882, but owing to the imperfect legislative technique adopted in that statute it was not until 1935 that the principle of separation clearly emerged as the dominating rule of the English law of matrimonial property. The rule of separation of property appeared on the scene linked with the principle that in matters of private law and of civil procedure married women have the same status and capacity as unmarried women and as men. The conjunction between these two principles is, however, entirely the outcome of the history of English law. Logically they are distinct. Husband and wife may have the same capacity to contract, to acquire and dispose of property, to sue and be sued in court, etc., and nevertheless they may by marriage acquire rights in each other's property, although for practical (not for logical) reasons to be discussed presently it is difficult to reconcile community of investment property with the rule of equality. That rule is today in this country and elsewhere in Western Europe and in North America beyond controversy, but recent developments both here and abroad have shown that a rigid principle of separation such as that which is enshrined in the Act of 1935 is unlikely to remain the last word.

That it may be not only unrealistic but unjust to insist on an uncompromising enforcement of the property norm between husband

[1] See the Terms of Reference of the Law Revision Committee, dated Jan. 10, 1934, and its Fourth Interim Report, Cmd. 4770. The anomalies mentioned in the Terms of Reference were those associated with the cases of *Scott* v. *Morley* (1887) 20 Q.B.D. 120, C.A., and of *Edwards* v. *Porter* [1925] A.C. 1.

and wife has clearly been the experience of the English courts.[2] Husband and wife normally enjoy and use much of their property together and very frequently their money and goods are mingled so inextricably that an appropriation of assets to one spouse or the other becomes a game in which the element of hazard exceeds that of arithmetical skill. Law reformers, legislators and judges are facing the problem of how to take account of these facts without encroaching on the rule of equality of husband and wife. Is it possible to find a compromise between the principles of separation and of community while at the same time preserving the equality of the spouses in matters of property, contract, and procedure? The present paper is intended to discuss some recent attempts to answer this question. It will be necessary in the first place (1) to say a word about community and separation in general, before (2) touching upon the question of a "community of surplus" and (3) surveying some special problems connected with "family assets," *i.e.*, with the matrimonial home and its contents.

1. Separation or Community?

The Royal Commission on Marriage and Divorce [3] was, by its Terms of Reference, charged with the duty, *inter alia*, "to consider whether any changes should be made in . . . the law relating to the property rights of husband and wife, both during marriage and after its termination (except by death)." It was thus incumbent on the Commission to examine proposals to introduce community of property as a general principle of matrimonial law. The majority of the Commission rejected these proposals,[4] and this decision is to be welcomed, though not entirely and not exclusively on the grounds on which it was made.

There are, it is submitted, strong arguments against a general system of community of property in this country. One of these appears in the Report of the Royal Commission [5]: it is that, as shown, *e.g.*, by French law,[6] community of goods is in practice

[2] In at least three types of cases, *viz.* (1) those connected with the position of the deserted wife occupying the matrimonial home, *e.g.*, *Bendall* v. *McWhirter* [1952] 2 Q.B. 466, C.A., and many others, the most recent example at the time of writing being *Churcher* v. *Street* [1959] 2 W.L.R. 66, (2) those in which the wife asserted as against the husband her property in the matrimonial home, such as *Shipman* v. *Shipman* [1924] 2 Ch. 140, C.A., *Boyt* v. *Boyt* [1948] 2 All E.R. 436, C.A., or *Gorulnick* v. *Gorulnick* [1958] P. 47, C.A., or in which she asserted her matrimonial right against his property right as in *Silverstone* v. *Silverstone* [1953] P. 147, and (3) those in which the court had to divide between the spouses the proceeds of the sale of some asset, such as *Rimmer* v. *Rimmer* [1953] 1 Ch. 363, C.A., and other cases discussed below.

[3] Cmd. 9678 (1956).

[4] Cmd. 9678, Para. 651, pp. 176–177.

[5] Para. 651 (iii), p. 177.

[6] Code Civil, Art. 1421: "Le mari administre seul les biens de la communauté. Il peut les vendre, aliéner et hypothéquer sans le concours de sa femme." There are certain limitations on his power in Art. 1422, and in amending legislation of 1938 and 1942, but these are not very significant. See Marc Ancel, in

incompatible with equality of the sexes. Someone must administer the community property, and there seems to be only one exception [7] to the general rule that in those legal systems in which a community of goods between husband and wife arises by operation of law,[8] the common property is administered by the husband. The law may restrict his powers, *e.g.*, with regard to gifts or to transactions concerning land, but the ultimate decision, *e.g.*, on a choice of investments, rests with him. To this extent the community régime entails a "subjection of women," a point which was perhaps dimly perceived by the delegate to the Nevada Constitutional Congress of 1864 who justified his vote in favour of a community régime with the lapidary pronouncement that "he did not like 'he-women.'" [9] The rights of the wife under a community system may be so attenuated as to be mere expectations [10] or they may be legally protected property rights [11]: her powers of disposition and management are of necessity suspended. Of necessity, because the alternative would be joint administration as envisaged by the minority of the Royal Commission who argued that the community "should be administered by husband and wife acting together." [12] This formula however is no answer to the question raised by the majority: what would happen if either spouse ran a business and the other objected to the ploughing back of profits or insisted in sharing in the management? If the husband wants to speculate in oil shares and the wife in real estate, who is going to decide? Joint administration would involve the frequent intervention of a court in situations in which the marital relations themselves do not call for such intervention. One may envisage situations in which a healthy marriage may be undermined, not so much by the difference of opinion itself as by the need for, and the possibility of resorting to, court proceedings for its settlement. This applies to all forms of community which comprise investment property, including the more

Friedmann (ed.), *Matrimonial Property Law* (1955), p. 13; Desbois, in Rouast (ed.), *Le Régime Matrimonial dans les Législations Contemporaines* (1957), pp. 191 *et seq.*

[7] The exception is the law of Soviet Russia: see Hazard, in Friedmann, *Matrimonial Property Law*, *supra*, pp. 212 *et seq.*; Fridieff, in Rouast, *Le Régime Matrimonial*, *supra*, pp. 329 *et seq.*, esp. p. 331.

[8] Further examples are the laws of Quebec (see H. Turgeon, in Friedmann, *Matrimonial Property Law*, pp. 139 *et seq.*, esp. p. 147); of the Union of South Africa, formerly also of Southern Rhodesia (see T. W. Price, *ibid.*, pp. 188 *et seq.*, esp. p. 191); of Louisiana (see C. J. Morrow, *ibid.*, pp. 29 *et seq.*, esp. p. 48); and of Arizona, California, Idaho, Nevada, New Mexico, Texas, and Washington (see R. E. Clark, *ibid.*, pp. 39 *et seq.*, esp. p. 101, and M. R. Kirkwood, *Historical Background and Objectives of the Law of Community Property in the Pacific Coast States* (1936) 11 Washington Law Review 1, reprinted in *Selected Essays on Family Law*, 1950, pp. 514 *et seq.*).

[9] Kirkwood, *ibid.*, p. 523.

[10] See, *e.g.*, the law of California as analysed in Richard R. B. Powell, *Community Property—A Critique of its Regulation of Intra-Family Relations* (1936) 11 Wash.L.R. 10, reprinted in *Selected Essays on Family Law*, 1950, pp. 525 *et seq.*, at pp. 540 *et seq.*

[11] See the analysis of the law of Washington, *ibid.*, pp. 546 *et seq.*

[12] Cmd. 9678, Para. 652 (ii), p. 178.

limited forms such as the statutory régime of the French Code,[13] and, as the Commission themselves indicate,[14] to the most widely advocated type of community, the *communauté réduite aux acquêts* [15] or *Errungenschafts-Gemeinschaft* [16] which is the statutory system of eight American states [17] and by which husband and wife are joint owners only of such assets as during marriage they have acquired through "work and thrift." All these systems presuppose administration by the husband because the alternative would be intolerable. This argument does not, or not to the same extent, apply where the community does not result from the marriage by operation of law but from an express contract between the spouses or future spouses, as, *e.g.*, under the present West German law.[18] There parties are supposed to include in the marriage contract a clause to determine "whether the joint property is to be administered by the husband or by the wife or by both jointly," and if they fail to do so (an unlikely contingency) they administer it jointly.[19] The decisive point is that the contract must be made before a judge or a notary,[20] who can draw the parties' attention to the pitfalls of an arrangement for "joint administration," and if they accept it they do so with their eyes open. The present English law does not prevent the spouses from agreeing that as many of their assets as they choose should be joint property,[21] and although this is of course different from an agreement for a general community, it may, if desired, be made to approach it closely. One may venture the generalisation that community of investment property is acceptable as a contractual but not as a statutory system. The emphasis is

[13] Art. 1401 C.C.; see Ancel, *ubi supra*, p. 11. It does not include land which the spouses owned at the time of the marriage or acquired during the marriage through gift or inheritance. Similarly in Quebec (see Turgeon, *ubi supra*, p. 149), and in Belgium (see Renard and Graulich, in the volume edited by Rouast, *supra*, p. 63).

[14] Para. 633, p. 172.

[15] French Civil Code, Art. 1498 *et seq.* Ancel, *supra*, p. 18, says that this is "the régime which is most often favoured by spouses making a marriage contract."

[16] See the (now repealed) Paras. 1519 *et seq.* of the original German Code.

[17] See note 8, *supra*. Also of Spain and the larger part of South America. See Rouast, *ubi supra*, p. 22.

[18] Law on Equality of Rights of Husband and Wife in the Field of Private Law (*Gesetz ueber die Gleichberechtigung von Mann und Frau auf dem Gebiet des buergerlichen Rechts*) of June 18, 1957. For a survey, see Leyser, *American Journal of Comparative Law*, Vol. 7, pp. 276 *et seq.* The relevant provisions are Paras. 1408 and 1415 of the Civil Code as amended by the new statute.

[19] *Ibid.*, Para. 1421.

[20] Para. 1410. The German Government expressed the most serious misgivings concerning the joint administration of the common property by the husband and wife, but the *Bundestag* insisted on a detailed regulation of this form of administration, which is now contained in the amended Paras. 1450–1470 of the Code. See for the history of these provisions and a summary of the objections to this form of administration: Reinicke, *Zum neuen ehelichen Gueterrecht*, *Neue Juristische Wochenschrift*, Vol. 10, pp. 889 *et seq.* (June 14, 1957), esp. at p. 893. Para. 1452 illustrates the need for frequent intervention of the court.

[21] "For the avoidance of doubt" this is declared in s. 4 (2) (c) of the Law Reform (Married Women and Tortfeasors) Act, 1935.

on "investment" as contrasted with "household" or "family assets," to which, as will be submitted below, different considerations may apply. It may be significant that the law of the Soviet Union appears to be the only one to provide that by marriage the property of the spouses becomes joint property to be administered jointly,[22] a principle perhaps to be explained by the absence of investment property in the capitalist sense.

Where community of property is the statutory system, the law is inevitably very complex. Matrimonial property law, says M. Marc Ancel,[23] "is one of the most developed as well as one of the most technical parts of the civil law of France. It would be no exaggeration to say that French matrimonial law corresponds in some respects in its extreme complexity and technicality to the law of real property in England." Many years ago a learned American author said,[24] with reference to the community régimes of some of the Western States: "The continuance of such a system . . . may be profitable to the pockets of their lawyers but it is certain to cause headaches to their judges and economic waste to their non-lawyer citizens." This results to some extent from the tendency to combine a modicum of protection for the wife with the husband's power of administration, and from the almost unavoidable co-existence of several "funds," the community fund, the husband's separate property and the wife's separate property. A glance at the recent comparative surveys edited by Friedmann [25] and by Rouast [26] must convince any reader that a statutory system of community property may be a lawyer's dream and a client's nightmare.

These are arguments which can perhaps claim a measure of general validity in all countries permitting private investment. There is, however, one additional argument militating against a community system in this country and (perhaps for reasons connected with the limitations of their terms of reference [27]) not mentioned in the Report of the Royal Commission. Many of the functions which elsewhere (*e.g.*, in France) are performed by the system of community of property *inter vivos* are in this country fulfilled by the law of intestacy, especially since the 1952 amendments

[22] See *supra*, note 7.

[23] *Ubi supra*, p. 3.

[24] Powell, *ubi supra*, *Selected Essays on Family Law*, 1950, p. 549.

[25] *Matrimonial Property Law*, 1955.

[26] *Le Régime Matrimonial dans les Législations Contemporaines*, 1957.

[27] The law relating to the property rights of husband and wife after the termination of the marriage by death was expressly excluded from the Terms of Reference, which was a handicap in view of the close connection between matrimonial and successoral rights. It is perhaps significant that one of the few Recommendations to have been implemented by legislation was one which dealt with the right of a former spouse to apply for provision to be made for her or him out of the predeceasing spouse's estate (see Recommendation No. (61)), which, as the Commission saw (Para. 525, p. 144), was close to the boundary of its Terms of Reference. See Matrimonial Causes (Property and Maintenance) Act, 1958, ss. 3, 4, 5, 6; and see a note in 22 M.L.R. p. 50.

of the Administration of Estates Act, 1925.[28] Very detailed and complicated statistical investigations would be required to prove the point, but it looks like a safe guess that, in a case of intestacy, the rules of the English law of succession give to the surviving spouse a stronger position than the community system does in France. A similar point was made by Professor Richard R. B. Powell when in 1936 he compared the effect of the New York Decedents' Estates Law with that of the Californian community régime.[29] The point must not be overstressed. English law protects the surviving spouse in the event of intestacy, and goes very far, —some think even too far—in this respect, but the Inheritance (Family Provision) Act of 1938 is, even after the amendment of 1952,[30] deficient in that it fails to give her or him an indefeasible right to share in the predeceasing spouse's estate exercisable despite any testamentary provisions to the contrary. In this respect a régime of community property achieves what English law does not achieve: to ensure that the widow is not by her husband's will deprived of what many would regard as a legitimate share in the property accumulated through their joint efforts. This protection can, however, and probably should be formulated in terms of successoral not of matrimonial rights. Foreign legal systems, both on the Continent of Europe [31] and in America [32] show that this can be done in a variety of ways. The need for protecting the surviving spouse against a misuse of the predeceasing spouse's freedom of testation is no justification for a community system.

These, it is submitted, are some of the arguments which support the attitude of the majority of the Royal Commission in rejecting community of property as a general principle, whereas the fact that such a system would be unfamiliar to modern English and Scottish law [33] or the absence of a "general desire" for a community [34] (there being no evidence for or against such a desire) do not seem to the present writer to be convincing grounds of rejection. One must, on the other hand, agree with the majority of the Royal

[28] Administration of Estates Act, 1925, s. 46, as amended by s. 4 of and the First Schedule to the Intestates' Estates Act, 1952. For the treatment in French law of the surviving spouse in the event of the intestacy of the predeceasing spouse see Ancel, *supra*, pp. 22 *et seq.*

[29] See the article quoted note 10, *supra.*

[30] Inheritance (Family Provision) Act, 1938, as amended by s. 2 of and Schedule III to the Intestates' Estates Act, 1952, and as reproduced in the Fourth Schedule to that Act.

[31] For a short survey see the comparative articles on *Freedom of Testation* by Gold, Robson, Kahn-Freund and Breslauer, 1 M.L.R. 296 (March, 1938).

[32] For a summary of the present state of both common and statute law in some of the principal states, including the important Decedent Estates Law of New York, see the extracts from the Second Volume of R. R. Powell's *Law of Real Property*, printed in Jacobs and Goebel, *Cases and Materials on Domestic Relations*, 3rd ed., pp. 878 *et seq.*

[33] Cmd. 9678, Para. 651, No. i. The majority themselves did not attach decisive importance to this point but thought that "the handicap of unfamiliarity must prejudice any measure."

[34] *Ibid.*, No. ii.

Commission where they [35] say that a community system may lead to grave injustice, *e.g.*, in the case of " a wife who has a lazy and improvident husband and who by her own hard work and thrift has managed to buy a house."

It is, however, one thing to reject the idea of community of property as a general principle, and quite another to endorse a system of separation without any mitigations. The general tendency in the present world would seem to be in the direction of a *rapprochement* between the two ideas. As Professor Julliot de la Morandière has said [36]: " *Si les régimes communautaires s'imprègnent peu à peu de séparatisme, les régimes de séparation doivent conserver ou reconstituer des institutions communautaires.*" " *Conserver ou reconstituer.*" English law has always " preserved " community elements such as the principles restricting tort actions between spouses,[37] the provisions on larceny between husband and wife,[38] the discretion of the court in settling property questions between them,[39] or the factual inference drawn by the courts against a contractual intention between husband and wife.[40] The question is how far English law should accept the suggestion that it must " establish " or " re-establish " community elements in further mitigation of the separation rule. This question was not fully answered by the Royal Commission. In the first place, the Commission did not examine the merits or demerits of the so-called " community of surplus," by which property remains separate but on termination of the marriage the difference between what the spouses own at that time and what they owned at the time of the marriage is equally divided between them (or their estates). In the second place, the arguments which have been advanced against the community principle in general do not necessarily refute a proposal to treat the spouses as beneficial joint owners of such property as they are likely, in the nature of things, to enjoy and administer jointly: convincing as the Report of the Royal Commission may be in relation to investment property, it does not, or not sufficiently, answer the question whether the matrimonial home and its contents should not be beneficially owned or at least be presumed to be beneficially owned in common. These two matters, the " community of surplus " and the problem of what is now often called " family assets," will be examined in the following pages.

[35] *Ibid.*, No. iv. That in such a situation the wife can be given the right to obtain a court order terminating the community (as normally provided in community systems, *e.g.*, in Art. 1443 of the French Code—" *demande en séparation des biens* "), is not necessarily a counter-argument, for such proceedings may in fact lead to the break-up of the marriage.

[36] In the Preface to Rouast (ed.), *Le Régime Matrimonial dans les Législations Contemporaines*, p. ix.

[37] Married Women's Property Act, 1882, s. 12.

[38] Larceny Act, 1916, s. 36.

[39] Married Women's Property Act, 1882, s. 17; Matrimonial Causes (Property and Maintenance) Act, 1958, s. 7.

[40] *Balfour* v. *Balfour* [1919] 2 K.B. 571, C.A.

2. Community of Surplus?

That husband and wife should share the benefit of any increase in their wealth produced during the marriage by their work or their thrift is a postulate which arises from the present stage of the development of Western society. It can hardly be a coincidence that it appeared almost simultaneously in statutes and drafts of statutes on the Continent, in the case law developed by the English courts, and (with regard to household savings) in the Report of the Royal Commission on Marriage and Divorce. As long as only a small minority of the people had any opportunity of saving part of their incomes, and the bulk of savings originated in income from investments (including land) or in business profits, such a demand was unlikely to arise. Its prominence in contemporary society results from a more even distribution of incomes, from the growth of the share of wages in the national revenue, and (which amounts to the same thing) from the fact that many working-class and lower middle-class families are in a position to make savings out of wage or salary earnings and to use them either towards accumulating small funds or towards the acquisition through instalment mortgages and hire-purchase contracts of a home and of its contents.[41] This social development (which is of fairly recent origin) must be seen in conjunction with the now universally recognised principle of equality of the sexes. In the present context this means that the wife's share in enabling the family to acquire a modicum of wealth should be recognised in financial terms. The generation which produced the Married Women's Property Acts of 1870 and of 1882 was able to see the need for preserving to the wife any savings which had been made out of her earnings, and the result was the rule of separation of property. Equality of treatment of husband and wife was restricted to those cases in which they exercised equal economic functions: work for wages, professional activities, etc. It did not extend to the contribution the wife made to the family's well-being as a housewife and a mother. In other words: the conception of equality underlying the principle of separation was based more on deductive reasoning than on sociological insight. It ignored the diversity of normal economic functions of husband and wife, and was, in a sense, as mechanical as the crude idea of "freedom of contract" which insists on treating as "equals" landlord and tenant, employer and employee. Nor was there, at the time of the Married Women's Property Acts, any felt need for going beyond this point: the inequality of economic functions of husband and wife was largely accounted for by the maintenance obligation which the law imposed upon him but not upon her. It was only when the current incomes of many wage-earning families began to yield more than the

[41] See Carr-Saunders, Caradog Jones and Moser, *A Survey of Social Conditions in England and Wales*, 1958, Chap. 11, pp. 136 *et seq.*, esp. Table 11.2 at p. 140; Marsh, *The Changing Social Structure of England and Wales, 1871–1957*, 1958, Chap. 9, pp. 212 *et seq.*, esp. pp. 224 *et seq.*

bare upkeep that the concept of equality underlying the principle of separation stood revealed as socially inadequate. If the husband through his industry and the wife through her thrift make it possible for the family to acquire wealth, it is not in accordance with a more than purely legalistic notion of "equality" to allow the husband to appropriate it merely because it was he alone who produced the cash. In theory the Royal Commission accepted this view. It said [42]

> "that marriage should be regarded as a partnership in which husband and wife work together as equals, and that the wife's contribution to the joint undertaking, in running the home and looking after the children, is just as valuable as that of the husband in providing the home and supporting the family."

The Royal Commission admitted that, under the present law, "real hardship" may occur "when the marriage breaks down" and "the wife who has given all her energy to her work in the home may have to face the situation that she has nothing she can call her own," not even—cruel irony—what she has saved from her household money.[43] The Commission also saw that the injustice may be on the other side [44] where the wife grudgingly "doles out" from the pay packet dutifully surrendered to her some beer and tobacco money but keeps to herself what she may be able to earn outside the house. There are, no doubt, these situations in which it is the husband who has the grievance because the money earned by the wife has been saved or used for acquiring permanent assets and the money contributed by him for the current expenses, but one may surmise (in the absence of evidence there can be no certainty) that where there is injustice it is more frequently the wife who has to suffer.

In some quarters it has been suggested that the husband should be legally liable to pay to his wife a definite proportion of his income or—another proposal—a cash allowance. The Royal Commission [45] called these ideas "quite impracticable"—a polite understatement. But the Commission itself was not able to apply a treatment for the malady it had so clearly diagnosed. It failed to translate into practical recommendations the policy it had formulated, except in one respect: it unanimously agreed [46] with the

[42] Cmd. 9678, Para. 644, p. 175. It is very interesting that the same idea influenced the change from separation to community in Soviet Russia in 1927. See Hazard in Friedmann (ed.), *Matrimonial Property Law*, at pp. 212–213. The Ukrainian and various other Codes state, as reported by Professor Hazard, "that the housework of a wife and the care of the children are to be equated with the husband's work for purposes of evaluating contributions to the marital property." See also the speech of the People's Commissar of Justice in the course of the discussion of the Draft of the Code of 1926 in Schlesinger, *Changing Attitudes in Soviet Russia* (*The Family*), pp. 115–116.

[43] Para. 644, p. 175.

[44] Para. 646, *ibid.*

[45] Para. 654, p. 178.

[46] Para. 651, V, p. 177; Paras. 699–701, p. 188.

opinion expressed by witnesses that the husband's exclusive right to the wife's household savings, laid down in *Hoddinott* v. *Hoddinott*,[47] and similar English and Scottish cases, was "not in accord with the view of marriage as a working partnership,"[48] and it recommended[49]

> "that savings made from money contributed by either the husband or the wife or by both for the purpose of meeting housekeeping expenses (and any investments or purchases made from such savings) should be deemed to belong to husband and wife in equal shares unless they have otherwise agreed."

An excellent proposal, as far as it goes, but does it go far enough? According to this recommendation, if, *e.g.*, the husband has given the wife a household allowance and she has saved part of it and used the savings for the acquisition of some furniture, the furniture belongs to both in equal shares. But if the husband, knowing his wife to be a thrifty woman, has given her an allowance smaller than would have been necessary had she been extravagant, and if it was he who saved the difference and used it for buying the furniture, then the money was never "contributed . . . for the purpose of meeting housekeeping expenses," and the furniture belongs to the husband alone. This does not make sense. The criterion of past appropriation to housekeeping purposes is arbitrary and unjust. Money, it is submitted, should, in the light of the Royal Commission's own policy, be regarded as "household savings" not by reason of having at one time been "earmarked" for household expenditure but by reason of being intended for future expenditure in the joint interest of the family. The very least one should demand would be that the principle laid down by the Royal Commission should extend to all money which represents not consumption forgone but consumption deferred, not, that is, investment primarily with an eye to interest or dividend or capital increment, but a growing fund accumulated in order to be used up or spent. Nor should it matter whether the specific purpose for which the fund is to be used has been determined from the outset, whether it is eventually used for the purchase of a television set (and if so whether through hire-purchase or—if this still happens—saving of the entire price prior to acquisition) or of a house, or for the future education of the children through an educational endowment policy or in any other form, nor whether the money is, for the time being, kept in bank-notes in the drawer of the kitchen

[47] [1949] 2 K.B. 406, C.A. See an article by the present writer in (1953) 16 M.L.R. 34. Note, however, that the Court of Appeal has now placed a potentially important restriction on the law as laid down in the earlier cases. In *Richards* v. *Richards* [1958] 1 W.L.R. 1116, money sent from abroad by the husband (a naval officer) to the wife to be spent by her as she should decide was held not to be a "housekeeping allowance" and to belong to her. See esp. *per* Morris L.J. at p. 1122. Is this case a straw in the wind?

[48] Para. 700.

[49] Para. 701.

cupboard or in a savings bank account or in a building society, or in a bank account or in National Savings Certificates, or even in stock exchange securities. The policy formulated but not implemented in the Report of the Royal Commission requires that the form of the savings is disregarded and that—in the spirit of the old equitable doctrine of "conversion"—the money (provided it originated in income of either spouse) receives its imprint from its intended purpose. Such money should, as between husband and wife, not be "his" or "hers," but "theirs."

The question is whether such a legislative policy could be translated into statutory language. The distinction between household savings and investment property is no more than a distinction of social types which, like most social types, are blurred at the edges. Can it be expressed in legal concepts, *i.e.*, be given a "hard crust"? What if the spouses change their minds, and, with growing affluence, decide permanently to invest what had hitherto been kept for future spending, or, under growing stress, decide to "disinvest" and to use "investments" for consumption? Is it advisable to make these vital distinctions hinge on the proof of intentions which, if it comes to litigation, will be hotly contested?

What is submitted here is this: The Royal Commission has made an unanswerable case for a new policy to give effect to the "partnership" of the spouses in terms of property law, but the proposal on household savings is an insufficient means towards this end. As soon, however, as one attempts to formulate a more adequate method, one is driven to proposals which may be self-defeating owing to difficulties of legal formulation and—more important even—difficulties of evidence.

Nevertheless, the problem of giving effect to what the Royal Commission calls the "partnership" of the spouses requires a solution, and it may be thought that through decisions such as *Jones* v. *Maynard*,[50] *Rimmer* v. *Rimmer*,[51] *Cobb* v. *Cobb*[52] and *Fribance* v. *Fribance*,[53] and also through what was said but not what was decided in *Silver* v. *Silver*,[54] the courts have pointed to a possible way out of the apparent impasse. In all these cases, except the last, both spouses had contributed in some form to the acquisition of some asset—the family home or securities—and the court held, either in exercise of its discretion under section 17 of the Married Women's Property Act, 1882, or simply by attributing an intention to the parties,[55] that the spouses were joint beneficial owners of the assets so acquired irrespective of who had the legal

[50] [1951] Ch. 572. This decision was expressly approved of by the Court of Appeal in *Rimmer* v. *Rimmer*, *infra*. See also *Macdonald* v. *Macdonald* [1957] 2 All E.R. 690.
[51] [1953] 1 Q.B. 63, C.A.
[52] [1955] 1 W.L.R. 731, C.A.
[53] [1957] 1 W.L.R. 384, C.A.
[54] [1958] 1 W.L.R. 259, C.A.
[55] As in *Jones* v. *Maynard*, *supra* (Vaisey J.).

title, and that on sale of the asset, the proceeds had to be distributed between them half-and-half. In the last of the above-mentioned cases the house stood in the wife's name but practically all the money had been found by the husband, and a very reluctant Court of Appeal allowed the case to be determined by the operation of the presumption of advancement. In the other cases, however, the extent of the financial contribution of either spouse was irrelevant, and they shared equally the difference between the proceeds of the asset and the sum total of their unequal contributions to the purchase price. This, however, is the essential feature of a "community of surplus," and it is for this reason that, in the present writer's submission, these decisions may be signposts to a development going beyond the recommendations of the Royal Commission but quite in line with its policy.

The decisions are, however, no more than signposts. In two obvious respects they fall short of what is needed to give effect to the idea of "partnership." In all the cases, except in *Silver* v. *Silver*,[54] both spouses had made cash contributions, and the courts have not so far applied the policy of these decisions to a case where the wife's contribution consisted in her work as a housewife. Moreover, in each of these cases the court had to deal with a specific asset, and when the Court of Appeal was invited to apply a similar principle to a case in which most of the proceeds of an asset had been spent and a balancing payment would have been required, it refused to do so.[56] It is true that the effect of this decision has now been removed by legislation,[57] but it is also true that the statute does not in express terms enable the court to look beyond money or property which is or has been in the possession or under the control of one spouse and in which the spouse claims a beneficial interest. It does not give to the court the power to distribute between the spouses the difference between the aggregate net value of their assets at the time of the end of the marriage and that net value at the time of the marriage itself.

Indeed, the last two cases in which the Court of Appeal had to consider the problem, *Silver* v. *Silver*[58] and *Richards* v. *Richards*,[59] seem to show a distinct need for law reform. In *Silver* the antiquated presumption of advancement stood in the way of what the members of the Court of Appeal themselves would have regarded as a just solution of the problem, and in *Richards* the husband's financial contribution to the acquisition of the house was unrequited. The decision in *Silver* was regrettable; that in *Richards* may have been inevitable in the very exceptional circumstances of that case and especially in view of the contributions made by the

[56] *Tunstall* v. *Tunstall* [1953] 1 W.L.R. 770. See note by Megarry, 69 L.Q.R. 308.

[57] Matrimonial Causes (Property and Maintenance) Act, 1958, s. 7. See note by the present writer, 22 M.L.R. 55.

[58] [1958] 1 W.L.R. 259, C.A.

[59] See footnote 47, *supra*.

wife's parents towards the acquisition of a house intended to serve as a home for them as well as for the husband, his wife and their child. The judgment of Morris L.J. in the *Richards* case (with which Hodson and Ormerod L.JJ. concurred) suggests that the principle of cases such as *Rimmer* and *Fribance* rests not merely on the fact of joint contributions but also on the existence of a joint plan to accumulate a fund, "joint efforts," as Morris L.J. put it. In *Richards* the husband, who was a naval officer serving abroad, had in fact through the naval allotments remitted to his wife helped towards the building up of a reserve, but he was not consulted about the purchase of the house, and was faced with the *fait accompli* of the purchase, which he gladly accepted. Would it not have been just to allow him to participate in any accretion to his and his wife's joint wealth made partly possible through his earnings? As the law stands this may not have been possible, but if the existing practice exemplified by cases such as *Rimmer* and *Fribance* is to be restricted to cases of active participation of both spouses in the acquisition of the asset, *i.e.*, if the financial contribution made by either spouse towards the acquisition of wealth is to be unrewarded in the absence of such participation, the law may be said to require change, a change which would permit the court to distribute the surplus between the spouses irrespective of the existence of a common plan to use a joint reserve for the acquisition of a particular asset.

In these circumstances a brief glance at developments abroad may be of more than academic interest. The "community of surplus" (*participation aux acquêts*, *Zugewinngemeinschaft*) has been widely advocated in France and was at one time embodied in a Bill before the French Parliament.[60] A system of equal division of assets on termination of the marriage (which goes beyond a mere community of surplus) has been in force in Sweden since 1920.[61] Now the community of surplus has been incorporated in the law of the German Federal Republic, through the *Gleichberechtigungs-Gesetz*,[62] the "law on equal rights of husband and wife in private law" of June 18, 1957, in force since July 1, 1958. This law is based

[60] See Ancel, *supra*, p. 27. See also the Draft Code of a Family Law for Israel, and see on this Livneh in Rouast, *Le Régime Matrimonial dans les Législations Contemporaines*, *supra*, pp. 230 *et seq.*

[61] See Malmstroem in Friedmann, *Matrimonial Property Law*, pp. 410 *et seq.*, and Hessler in Rouast, *Le Régime Matrimonial dans les Législations Contemporaines*, pp. 301 *et seq.* Similar legislation is in force in Denmark (see Munch, *ibid.*, pp. 109 *et seq.*), Finland (see Godenheim, *ibid.*, pp. 177 *et seq.*), Norway (see Hiorthoy, *ibid.*, pp. 261 *et seq.*), and apparently also in Iceland. The Commission refer to this in Para. 631, p. 178. The reference made to the Scandinavian law by the minority in Para. 653 (ii) is not clear: the minority say that they envisage a system such as is in force in Scandinavia, but nevertheless recommend administration by the spouses acting together. For Norway see also Appendix III to the Report, pp. 392–393.

[62] See note 18, *supra*. For surveys see the article by Leyser quoted in note 18 and the article by Reinicke, quoted in note 20. For a critical analysis, Mueller-Freienfels, *Kernfragen des Gleichberechtigungs-Gesetzes*, *Juristenzeitung*, 1957, pp. 685 *et seq.*; also Baermann, *Kritik am neuen Ehe-Gueterrecht*, *ibid.*, 1958, pp. 225 *et seq.*

upon, and was made necessary by, the principle of equality of husband and wife which is enshrined in the Bonn Basic Law [63] and with which the provisions of the Civil Code of 1896 on matrimonial property were clearly incompatible. The "community of surplus" has taken the place of the husband's statutory usufruct as the statutory system of matrimonial property.[64] It can be contracted out of by ante- or post-nuptial contract,[65] by which the parties may modify the statutory scheme or adopt *in toto* as alternatives complete separation of property or a true community, but in the absence of a marriage contract (to be made before a judge or notary) they live in "community of surplus."

Despite its name it is not a community at all, as that term is normally understood, for it is expressly laid down that on marriage each retains what he or she has, that property acquired after marriage does not become joint poperty either,[66] and that—a great innovation in Germany—each administers his or her property independently.[67] It is primarily a system of separation of property, and the "community" element appears not at the beginning of the marriage but at its end, when any surplus of property gained during the marriage is "equalised," "balanced." [68] It is thus a method of accounting between spouses or former spouses—as compatible with the idea of separation of property during marriage as were the decisions in *Rimmer* v. *Rimmer* [69] and similar cases with the principle of section 2 of the Law Reform (Married Women and Tortfeasors) Act, 1935. The surplus which is equally distributed is that which, in the course of the marriage, the spouses accumulated together through work and thrift. To find out what it is, the net "initial property" of each spouse, *i.e.*, his assets minus liabilities at the inception of the "community," is deducted from his net "final" property, *i.e.*, assets minus liabilities at the end of the "community." The spouse whose surplus is the smaller of the two is entitled to be paid by the other spouse one-half of the difference between the surpluses.[70] What either spouse has acquired by way of gift or inheritance is not intended to be part of the surplus and therefore added to his "initial property." [71] On the other hand, whereas the "final" property is valued as at the date of the

[63] Basic Law for the Federal Republic of Germany of May 23, 1949, Art. 3, Para. 2.

[64] The relevant provisions in Book IV, Title VI, of the 1896 Code went out of force on April 1, 1953, in accordance with Art. 117 of the Basic Law, and a régime of separation took their place (see Massfeller in Friedmann, *supra*, pp. 369 *et seq.*). This has now been replaced by the new statute.

[65] Civil Code, Para. 1408, as amended by the law of 1957.

[66] Para. 1363 II.

[67] Para. 1364.

[68] Para. 1363 II. The German word is *ausgeglichen*. As Mueller-Freienfels says, *ubi supra*, at p. 692: it is "Separation of Property with Equalisation of Surplus." ("*Guetertrennung mit Ausgleich des Zugewinns.*")

[69] [1953] 1 Q.B. 63.

[70] Paras. 1372, 1373, 1374, 1375, 1378 of the Code as amended.

[71] Para. 1374.

termination of the community and in the case of a divorce as at the date of the petition, the initial property is valued as at the date of the inception of the community, normally that of the marriage.[72] Thus accretion to capital is surplus as if it were accumulated income, and, as the Court of Appeal so clearly saw in the *Rimmer* case, this is the only common-sense solution of a difficult problem. It is equally right that loss of capital value should reduce the surplus: husband and wife share "for better or worse," amongst other things, the consequences of fluctuating market prices.

It may be objected that the determination, after perhaps many years, of the "initial" property of either spouse may be a source of, or opportunity for, mutual irritation such as the whole scheme is intended to stop, but here the German draftsman has hit upon an ingenious device: either spouse can require that the other collaborates in the making of an inventory. If such a "joint" inventory of a spouse's initial property has been made it is, as between the spouses, rebuttably presumed to be correct, but—obviously the normal case in practice—in the absence of an inventory, the spouse is deemed not to have had any initial property, *i.e.*, the final property is deemed to be surplus.[73] This presumption accords with the realities of life in an industrial community in which the majority of people start life without appreciable assets, and it makes it easier to administer the scheme in practice.

It is not difficult to imagine that where matrimonial relations deteriorate either spouse may seek to reduce his surplus by giving away assets to relations or others, and, even without such intention, he may act to the detriment of the other spouse through waste or in other ways. This is a contingency of which the law must take account. The German law[74] seeks to do so by laying down that there is added to the final property of either spouse the value of any assets of which, without the other spouse's consent, he divested himself within the last ten years through gift (other than usual), waste, or acts designed to be detrimental to the other spouse. Recipients of the liberality and third parties knowingly participating in the despoliation of the other spouse's interests may be liable to him or her for unjust enrichment.[75] The details of these highly

[72] Para. 1376; Para. 1384.

[73] Para. 1377. See, however, on the other hand the interesting and important provision in Para. 1376 IV, according to which, in calculating the surplus, an agricultural or forestry undertaking must be assessed on the basis of a given number—in most parts of Germany 25—of years' purchase, and not in accordance with what it would fetch between vendor and purchaser. Since capital values are much more likely to fluctuate than "permanent yield of income," this provision expresses a deliberate policy to protect the undisturbed existence of the undertaking as against the claims of the widow, comparable to the policy of the common law which made the leasehold if vested in the farmer's wife illogically but sensibly "survive" to the husband. See the highly interesting analysis by Mueller-Freienfels, *ubi supra*, p. 691, who appears to regret that a similar protection has not been given to industrial and commercial undertakings, or to copyright, etc.

[74] Para. 1375.

[75] Para. 1390.

pathological situations are of no interest. It will, however, be seen that the community of surplus does impose on either spouse certain obligations of financial decency in relation to the other which are capable of enforcement.

For reasons connected with the German law of intestacy and of compulsory legacies (*Pflichtteil*) the provisions on equalising the surplus have only limited application in the event of the normal termination of marriage by the death of either spouse.[76] In this respect the new German law can only be of little interest in this country in view of the fundamental differences between the English and the German laws of succession. The practical interest of the German scheme lies in the opportunity it provides for a comparatively simple method of settlement between the spouses in the event of a breakdown of the marriage, irrespective of whether or not there is a divorce.[77] As many English cases have shown,[78] the court should have an opportunity of regulating the property relations of the spouses when they cease to cohabit, and the German law—with the details of which one may well disagree [79]—gives to either spouse in that event the right to demand the balancing of the surplus. It gives the same right to either if the other one has culpably failed to comply with " the economic obligations arising from marriage " [80] and if it can be assumed that he or she will not perform them in future, *e.g.*, if the husband wilfully neglects to maintain the family or the wife to fulfil her duties as a housewife and mother, but in extreme cases of this kind the spouse—normally the husband—who would be liable to make the balancing payment, can refuse to make it.[81] The court can also terminate the " community " where either spouse squanders his or her assets or unreasonably and persistently refuses to inform the other of the state of his property.[82] If this latter provision was extended to " income " (as it should be) it might perhaps be a way of inducing a man to tell his wife what he

[76] Para. 1371. See the closely reasoned analysis by Mueller-Freienfels, pp. 686 *et seq.* The German law—Para. 1931—is niggardly to the surviving spouse in the event of intestacy, whereas English law is generous. On the other hand German law gives more adequate protection to the surviving spouse against a misuse of freedom of testation than does English law. For these reasons alone no attempt is made here to discuss the provisions of the new German law which apply in case of a termination of the marriage by death.

[77] See Paras. 1385–1389 which deal with the " action for anticipated balancing of the surplus."

[78] *e.g.*, *Birkett* v. *Birkett* (1908) 98 L.T. 540; *Hoddinott* v. *Hoddinott* [1949] 2 K.B. 504, C.A.; *Rimmer* v. *Rimmer* [1953] 1 Q.B. 63; *Silver* v. *Silver* [1958] 1 W.L.R. 259.

[79] Para. 1385. They must have lived apart for at least three years. The German law allows the question of " fault " to intrude upon the matter. Only the spouse who is not at fault in the matrimonial sense can bring the action, and neither can if both are.

[80] Para. 1386. The German phrase covers the husband's obligation to earn a living as well as the wife's obligation to manage the household.

[81] Para. 1381. See on this Reinicke, *supra*, p. 891; Baermann, *supra*, pp. 227–228.

[82] Para. 1386.

earns, a better way than the somewhat fantastic remedies suggested to and rejected by the Royal Commission.[83]

Whatever else it does, the German scheme has the merit that it eliminates complicated problems as to the contribution either spouse happened to have made to the acquisition of wealth during marriage, and that it thus protects the wife whose contribution can often not be assessed in monetary terms.[84] It excludes the sordid and pettifogging arithmetical exercises which may sometimes be an excuse for getting rid of such venom as has not been used up in divorce or other matrimonial proceedings. Like the method adopted by the English courts in cases of the *Rimmer* type it is a measure of rough justice, a Gordian knot procedure by which the law applies to atypical cases a ruling derived from typical situations, *i.e.*, to the broken-down marriage the rules of behaviour of normal spouses who do not in their mutual relations draw up accounts appropriate to a business partnership.

Clearly a scheme such as this could not be adopted in this country without great modifications. It would have to be co-ordinated with existing procedures serving similar purposes such as those under section 17 of the Married Women's Property Act, 1882, and, in connection with the variation of settlements, under section 25 of the Matrimonial Causes Act, 1950. But the basic idea is in line with the policy of the courts in the *Rimmer* type of case and also with the recommendations of the Royal Commission on household savings. In those numerous cases in which the entire "surplus" consists of household savings the German scheme and the recommendation of the Royal Commission may in practice be very similar.

A "community of surplus" would operate only between the spouses and would not affect third parties. In relation to third parties the spouse who is held out as the owner would not only have the title but also be regarded as the beneficial owner in equity. One advantage of the "community of surplus" is that it leaves intact the rights of creditors to attach any given asset in satisfaction of a judgment debt. It does not lead to the invidious situation in which, *e.g.*, a bank account stands in the name of one spouse but in equity belongs to the other or to both jointly with the result that it cannot be attached by any creditor of either.[85]

[83] See Report, Para. 710, p. 190, *e.g.*, that she should have an actionable right of disclosure enforceable by a claim to see the employer's copy of the pay slip, or to interview the tax inspector.

[84] Much as under the Intestates' Estates Act, 1952, s. 5 and Schedule II, the surviving spouse is in the event of an intestacy entitled to acquire the matrimonial home, so under the German law the court can appropriate to the spouse entitled to a balancing payment selected assets in partial satisfaction of his claim. (Para. 1383.) Mutual gifts must be brought into hotchpot. (Para. 1380.)

[85] *Harrods, Ltd.* v. *Tester* [1937] 2 All E.R. 236, C.A., which is to the effect that if a bank account stands in the name of one spouse but in equity belongs to the other it cannot be garnished by any creditor of either.

3. Family Assets

"Family assets,"[86] *i.e.*, the matrimonial home and its contents, raise a special problem. It is in the nature of these assets that husband and wife should enjoy and administer them jointly. The essential point is not so much that they both may have contributed to their acquisition (this is the case with any "surplus" value, however invested), nor that they are intended for joint use or consumption (as is normally the case with household savings), but that they are actually so used. What one may call the "community element" does not or not only consist in the past history or the future destiny of such assets but in their present physical nature.

The matrimonial home and its contents are, as it were, the material substratum of the matrimonial consortium. We are here at the point where property relations and personal relations become indistinguishable. To divide the "family assets" is tantamount to destroying the basis of cohabitation, and if a judge excludes either spouse from their use by reason of the ownership vested in the other he pronounces what in fact is the equivalent of a separation order.[87] Any serious difference between husband and wife on the administration of these assets is likely to be identical with or symptomatic of a matrimonial difference of a personal character, and in this respect quite unlike a difference of opinion on investment. It is indicative of some matrimonial trouble which, sooner or later, may make it necessary for a court to intervene in the affairs of the spouses.

From this two conclusions would appear to follow: the first is that, as between the spouses, with reference to such family assets, considerations of property must be overlaid or displaced by matrimonial considerations: any assertion of property rights with regard to family assets as against the other spouse finds its limitations in the matrimonial duties the spouses owe one another. The second conclusion is that those arguments which decisively militate against a community of goods do not, or at least not fully, apply to family assets. Joint administration, so far from being impracticable, is here inevitable in view of the very purpose of the assets involved. The law may insist on separation of ownership and even postulate separate possession in the legal sense: separate enjoyment or separate administration is incompatible with normal married life.

These propositions sound highly theoretical—yet they are no more than conclusions which must obtrude themselves on anyone who, since the end of the Second World War, has read the long

[86] This was the expression used by Denning L.J. (as he then was) in *Cobb* v. *Cobb* [1955] 1 W.L.R. 731, at p. 734, and in *Fribance* v. *Fribance* [1957] 1 W.L.R. 384, at p. 387; and by Parker L.J. (as he then was) in *Silver* v. *Silver* [1958] 1 W.L.R. 259, at p. 265.

[87] See *Shipman* v *Shipman* [1924] 2 Ch. 140, C.A., esp. *per* Pollock M.R. at p. 144, and *per* Atkin L.J. at pp. 145–146. See also Cmd. 9678, Paras. 616–619, pp. 168–169.

series of decisions on the " occupation of the matrimonial home by the deserted wife " and the shorter but equally significant line of cases in which the wife, by asserting her right of property in the matrimonial home, sought to force the husband to quit or to stay away.

Sheer necessity has compelled the courts to enforce between husband and wife with regard to these assets community obligations which go far beyond the beneficial distribution of an eventual surplus and concern the use to be made of the family assets themselves. The body of case law which has emerged from this development is complicated. The legal basis of such principles as the courts have evolved is far from clear. The question arises whether the open acknowledgment of a community of goods with regard to family assets would not simplify and rationalise the law. If this were so, two further questions would pose themselves, *viz.*, whether the spouses should be free to contract out of any such community, and what effect, if any, such community should have with regard to third parties, such as landlords, purchasers, or mortgagees.

In the first place, however, it seems apposite to say a word about the existing law, not in order to review the cases which have been discussed many times, but so as to examine the legal foundation on which they rest.

(*a*) *The present law*

The most important act of " administration " of family assets is to determine the place of the matrimonial home. In the fundamental case of *Dunne* v. *Dunne* [88] the Court of Appeal has held that this is of necessity an act of joint administration, *i.e.*, that neither spouse can make this decision and they must either make it together or leave it to the court to say which of them acted " unreasonably " in not accepting the view of the other.

Further, whatever be the basis on which either spouse asserts against the other a right of property in the matrimonial home, the court will insist on using its discretion in acceding to or rejecting the claim, and this not only where such discretion is expressly given to the court by statute, *i.e.*, by section 17 of the Married Women's Property Act, 1882, but also where the wife, taking her stand on section 12 of the Act, relies on her right of ownership. The recent decision of the Court of Appeal in *Gorulnick* v. *Gorulnick*,[89] without in the least laying down new law,[90] makes this perfectly clear,

[88] [1949] P. 98, C.A.

[89] [1958] P. 47, C.A.

[90] See *Symonds* v. *Hallett* (1883) 24 Ch.D. 346; *Shipman* v. *Shipman*, *supra*; *Boyt* v. *Boyt* [1948] 2 All E.R. 436, C.A. *Silverstone* v. *Silverstone* [1953] P. 174, was a different case in which the wife succeeded in getting an injunction to prevent the husband from entering during the divorce proceedings the matrimonial home of which he was the owner, but the principle was the same. It was, as put by Pearce J., that " the wife is not without rights in the matrimonial home even though it belongs to the husband." The words " wife " and " husband " are clearly interchangeable in this sentence.

whatever one may feel about the way the court exercised its discretion in this particular case.[91]

That the husband who has deserted his wife in the matrimonial home of which he is the owner or the legal tenant cannot evict her as of right, is beyond any controversy.[92] The long argument which, since the decision of the Court of Appeal in *Bendall* v. *McWhirter*,[93] has been conducted about the position of third parties, especially purchasers and mortgagees, seems to have ended with a compromise solution emerging from the decisions in *Woodcock* v. *Hobbs*[94] and in *Westminster Bank* v. *Lee*[95]: the right of the deserted wife to occupy the matrimonial home is not an equitable interest but an equity which binds any third party (including an equitable mortgagee) only to the extent to which that party is affected by knowledge or by constructive notice.[96] In so far as the right is

[91] See the note by A. Milner in 21 M.L.R. 315.

[92] See for the initial difficulties: *Bramwell* v. *Bramwell* [1942] 1 K.B. 370; *Pargeter* v. *Pargeter* [1946] 1 All E.R. 570, both decisions of the Court of Appeal. The law was clarified in *Hutchinson* v. *Hutchinson* [1947] 2 All E.R. 792, and in *Steward* v. *Steward* [1948] 1 K.B. 507, C.A. Important decisions defining the scope of the wife's right were rendered in *Lee* v. *Lee* [1952] 2 Q.B. 489n., C.A. (right to obtain injunction against sale); in *Murcutt* v. *Murcutt* [1952] P. 266 (no right to restrain the husband from evicting grown-up daughter); and in *R.* v. *Twickenham Rent Tribunal* [1953] 2 Q.B. 425 (no right to apply for reduction of rent). The duration in time of the right was defined in *Vaughan* v. *Vaughan* [1953] 1 Q.B. 762, C.A. (right terminates with divorce).

[93] [1952] 2 Q.B. 466, C.A. Both the case law and the literature surrounding this matter are very voluminous. For surveys of the periodical literature see the present writer's contribution to Friedmann, *Matrimonial Property Law*, p. 299, note 20; Mitchell, "Learner's Licence," 17 M.L.R. 211, note 1; Bromley, *Family Law*, p. 400, note (c).

[94] [1955] 1 W.L.R. 152, C.A.; see a note by the present writer in 18 M.L.R. 412; to the same effect the decision in *Churcher* v. *Street* [1959] 2 W.L.R. 66, where Roxburgh J. explained the discretion he was exercising *ex necessitate rei*.

[95] [1956] Ch. 7. This case can be regarded as the end of a development the earlier stages of which were *Lloyds Bank* v. *O*—— [1953] 1 W.L.R. 1460, and *Barclays Bank* v. *Bird* [1954] Ch. 274. For a critical discussion of *Westminster Bank* v. *Lee*, see H. R. Gray in 18 M.L.R. 596.

[96] This is a compromise between the view that her right is an equitable interest which as against other equitable interests would be protected by the principle *qui prior est tempore potior est jure*, but not of course against the purchaser for value and without notice of the legal estate, and the view that it is a purely personal right which is not in any event protected against third parties. The first of these views might be said to be implied (not expressed) both in the judgment of Denning L.J. in *Bendall* v. *McWhirter*, *supra* (who relied on *Tulk* v. *Moxhay* (1848) 2 Ph. 774) and also in that of Romer L.J. who referred to a "clog or fetter," perhaps also in those of Jones J. in *Ferris* v. *Weaven* [1952] 2 All E.R. 233, and of Lynskey J. in *Street* v. *Denham* [1954] 1 W.L.R. 624, two cases in which the wife was protected against a purchaser of the legal estate. The second view emerges from the judgment of Jenkins L.J. in *Bradley-Hole* v. *Cusen* [1953] 1 Q.B. 300, C.A., and his interpretation of *Bendall* v. *McWhirter*, *supra*. It has been foreshadowed by Roxburgh J. in *Thompson* v. *Earthy* [1951] 2 K.B. 596, who has however now in *Churcher* v. *Street*, *supra*, accepted the compromise solution. In *Lloyds Bank Ltd.* v. *O*——, *supra*, and in *Barclays Bank Ltd.* v. *Bird*, *supra*, Upjohn J. and Harman J. held that the wife's right arose at the time of the desertion so that a mortgagee whose mortgage had been created prior to that time could enforce his right of possession against her. Had it not been for this doctrine, Harman J. in the *Barclays Bank* case might have had to decide a

enforceable against a third party, the court has a discretion to fix a time limit within which the deserted wife must quit.

The right of the deserted wife to occupy the matrimonial home is now said to rest on the fact of desertion, not on the marriage itself.[97] If so, she does not have such a right in the event of her being a "constructive deserter," in the event of the spouses living apart by agreement or in other circumstances in which neither is a deserter, or if she has committed adultery.[98]

Whether the deserted husband has a right to occupy the matrimonial home if it belongs to the wife is not clear. There is a county court decision to the contrary,[99] but apparently no authority emanating from a superior court.

Lastly, nothing in the voluminous and complicated case law surrounding the deserted wife's right to occupy the matrimonial home suggests that a wife driven out of the house by the husband in circumstances which amount to constructive desertion on his part can compel him to take her back, let alone to make room for her.[1]

This attempt to summarise the case law on this matter is a deliberate and perhaps audacious effort to bring into focus what appear at the present moment to be the main results of the existing cases.

A number of suggestions have been made from time to time as to the legal basis of the discretion which the court exercises in these matters. Where the husband seeks to evict his wife, section 17 of the 1882 Act is a sufficient explanation. He cannot proceed against her except by invoking the discretionary jurisdiction of the court under that section because all other avenues are blocked by section 12 of the Act.[2] But section 17 offers no explanation where it is the wife who proceeds against the husband, *i.e.*, in the *Shipman* v.

question of priority between equitable rights. But in *Westminster Bank* v. *Lee*, *supra*, the question arose between the deserted wife and a bank holding an equitable mortgage created after the desertion. This was the critical case in which the judge was compelled to define the nature of the wife's right.

97 See the judgments in the *Lloyds Bank* and *Barclays Bank* cases, *supra*. This view was also accepted by the Court of Appeal in *Woodcock* v. *Hobbs*, *supra*. Obviously if prior desertion is one of the facts notice of which is a condition for the enforcement of the wife's right against a third party the possibilities of such enforcement are thereby much attenuated. This is perhaps an intended consequence of the doctrine.

98 The wife's adultery is said to give the husband the right to revoke her authority to stay in the house, but *Wabe* v. *Taylor* [1952] 2 Q.B. 735, C.A., seems to lay down that a third party cannot rely on the fact of the wife's adultery until the husband has actually revoked her "licence" to stay. This case dealt with the situation of the landlord of rent-controlled premises and whether it yields a general rule is not quite clear.

99 *Seel* v. *Watts* [1954] C.L.Y. 2861. Can this case stand with *Gorulnick* v. *Gorulnick* [1958] P. 47? If her right to throw him out of her house is subject to the discretion of the court, why should it make a difference whether she is still there or has left?

1 *Cook* v. *Cook* (1954) 104 L.J. 700, a county court case quoted Cmd. 9678, Para. 613, p. 167. And see *Richman* v. *Richman* [1950] W.N. 233, quoted *ibid.*, Para. 619, p. 168.

2 Because in English law all proprietary remedies are delictual.

Shipman [3] and *Gorulnick* v. *Gorulnick* [4] type of case. Why can she not insist on her rights under section 12? Two possible answers may in fact be nothing but diverse formulations of the same idea: one is that as husband and wife the spouses grant each other mutual irrevocable licences to participate in the use of the family assets whoever is their owner,[5] the other is that, as long as the spouses are entitled to mutual consortium, they cannot treat each other as strangers with regard to these family assets, *i.e.*, that the property relation is subject to the matrimonial rights and duties.[6]

But what is the basis of the discretion where third parties are involved? Why is it that the "equity" the wife has in relation to third parties is subject to the power of the court to fix a time limit within which she must quit? Not because section 17 applies, for that section, except in so far as it confers rights on third parties, only applies between husband and wife,[7] and not of course the marriage itself. The legal basis of this discretion is obscure. We are confronted with a genuine case of judicial law-making.

Why has it been said that the wife's right to occupy the matrimonial home arises on desertion and not on marriage? Why has it been suggested that the deserted husband has no such right? Is there anything in the suggestion occasionally to be found in judicial utterances [8] that the deserted wife's right to occupy the matrimonial home is an emanation of her common law right to be maintained by the husband, a right enforced at common law through her power to pledge the husband's credit? Would this explain that the right is not available to the husband, and that the wife has it only as from the moment of, and on the ground of, desertion?

One does not have to be unduly fond of the illusion that the law is a seamless web of "rules" yielding conclusions by means of logical deductions—and one may nevertheless feel that a modicum of clarity is not necessarily harmful. The present situation with regard to family assets shows a chaotic interplay of legal ideas: section 17, mutual licences, matrimonial duties versus property rights, an "equity" subject to discretion, the maintenance obligation as a source of property rights. Some may feel that it may be time for a revision of the law of family assets and that just as the decisions of the *Rimmer* type were possible pointers towards a developing "community of surplus," so the case law on the right

[3] [1924] Ch. 140.
[4] [1958] P. 47.
[5] See the judgment of Denning L.J. in *Bendall* v. *McWhirter*, *supra*.
[6] See, *e.g.*, the judgments of Cotton L.J. in *Symonds* v. *Hallett* (1883) 24 Ch.D. 346, of Pollock M.R. and Atkin L.J. in *Shipman* v. *Shipman*, *supra*, and of Hodson L.J. and Morris L.J. in *Gorulnick* v. *Gorulnick*, *supra*.
[7] Except—perhaps—a trustee in bankruptcy (see *Bendall* v. *McWhirter*, *supra*) and, under s. 23 of the Married Women's Property Act, 1882, the wife's personal representatives. See *Re Camkin's Question* [1957] 1 W.L.R. 255. Why not the husband's personal representatives? Is it not perhaps time to replace the remainders of the 1882 Act by a more adequately drafted statute?
[8] Esp. in the judgment of Denning L.J. in *Bendall* v. *McWhirter*, *supra*.

to occupy the matrimonial home may perhaps indicate a trend towards a community of property in these family assets, a community giving rise to mutual rights subject to judicial discretion. Is the lack of clarity in the foundations of what the courts are now doing to be attributed to a state of transition from separation to community and would therefore an open acknowledgment of a community of property in family assets contribute to a clarification of the law? How far has the Royal Commission gone in this direction?

(*b*) *The proposals of the Royal Commission*

The Royal Commission regarded it as a " vital consideration that so far as possible the law should be kept out of the intimate life of the family." [9] This policy and also the idea of " partnership " formulated in another passage of the Report might have led to a recommendation to eliminate the property norm from the relation between the spouses in matters concerning their home and its contents. Yet only seven of the twelve members of the Royal Commission were prepared to accept community in any form,[10] and of these only three favoured community for the matrimonial home of its contents to the exclusion of other property, whilst one member recommended community only for the contents of the home.[11]

On the other hand, the Royal Commission found themselves impelled by the force of circumstances to make a number of recommendations on the matrimonial home and its contents by which to some extent they gave effect to community principles.[12]

One of these recommendations (made with only one member dissenting) is to the effect that if one spouse leaves the other in the matrimonial home, he or she should not be able to turn out the other spouse or to take away any of the essential contents of the home without an order of the court. The " deserted wife's right to occupy the matrimonial home " is thus extended to the husband,[13] and it would, although the point is implied rather than expressed, apply whenever either spouse is left in the home, irrespective of whether the case is one of desertion in the technical sense, and possibly even cover the case of consensual separation (which, it is submitted, should be made explicit). The right of the spouse would remain subject to the " unfettered discretion " of the court " to make such order as it thinks fit," in the light of, *e.g.*, the circumstances in which the other spouse left, the conduct of both, and their means, and also, one would hope, the interest of the children. The court would continue [14] to be free to order the

[9] Cmd. 9678, Para. 647, p. 176.
[10] Para. 651, pp. 176–177.
[11] Paras. 652–653, pp. 177–178.
[12] Paras. 685, 686, pp. 184–185; Paras. 697–698, p. 187.
[13] Para. 681, Para. 685, pp. 183–184. For the existing law, see note 12, above.
[14] *Woodcock* v. *Hobbs* [1955] 1 W.L.R. 152, C.A.

occupying spouse out subject to whatever delay seems appropriate, to make it incumbent on the other spouse to find alternative accommodation, etc. The court would not, however, except at the time of or after a divorce or nullity, decree nisi or separation decree,[15] be able to force the owning spouse who has remained in occupation to make room for the non-owning spouse, not even where the non-owning spouse was driven out of the house by acts of constructive desertion or cruelty. Under these Recommendations the matrimonial rights of the non-owning spouse would be no more than a shield to defend him or her against the assertion by the owning spouse of his property rights. They could not be used as a weapon of attack to assert as against the right of ownership that of the use of the home. The distinction is reminiscent of, and as crude as, that made in the defunct case of *Chandler* v. *Webster*.[16]

If the Recommendations of the Royal Commission were accepted, the right of a spouse to occupy the matrimonial home would be a strictly personal right against the other spouse, but, as now,[17] he or she would be able to obtain from a county court or from the High Court an order restraining the owning spouse, either for a stated period or until further order, "from disposing of any interest in the home or in the essential contents, or surrendering the tenancy."[18] This would, however, contrary to the present law, be capable of registration as a charge on the land, and, if registered, be binding on third parties.[19] In the absence of such registration third parties would not be affected. The "equity" of the present law would thus disappear, and the spouse in occupation be exposed to eviction by mala fide as well as bona fide purchasers (even in circumstances such as *Ferris* v. *Weaven*[20]) and also, contrary to *Bendall* v. *McWhirter*,[21] by the trustee in bankruptcy. Nor would the court have any discretion to give the occupying spouse time to find alternative accommodation. One understands that the Royal Commission was anxious to protect freedom of alienation and to give effect to what one may call the "conveyancing interest" against the "family interest," and a measure of certainty in the law may have to be purchased at the price of some hardship, but the Recommendations may go too far in this direction. One also understands that, subject as it is to the discretion of the court, the right to occupy the matrimonial home could not have been made registrable and that only a court order (or written undertaking by the owning spouse which would be to the same effect[22]) can be given

15 Para. 697, p. 187, and contrast Paras. 656–661, pp. 179–180.
16 [1904] 1 K.B. 493. C.A., overruled in *Fibrosa* v. *Fairbairn* [1943] A.C. 32.
17 *Lee* v. *Lee* [1952] 2 Q.B. 489n., C.A.
18 Para. 685 (b), p. 184. This would include an order to restrain the spouse in occupation from selling, pledging or giving away any essential furniture or equipment: Para. 674.
19 Para. 671, p. 182; Para. 685 (b), pp. 184–185.
20 [1952] 2 All E.R. 233.
21 [1952] 2 Q.B. 466, C.A.; see Para. 669, pp. 181–182.
22 Para. 673, p. 182.

the effect of a *jus in rem*. But how often will the deserted wife be alert or astute enough to make use of so complex a remedy, requiring as it normally does the two successive steps of application to the court and of registration? How often on the other hand, will the owning spouse, if spiteful, have disposed of the premises or of the tenancy, long before an application reaches the court, long before the court has even had time to issue an interim *ex parte* injunction?[23] Moreover, whatever one may feel about the policy of *Bendall* v. *McWhirter* and similar cases, why should the protection given to the wife at present by the Rent Acts as interpreted in *Brown* v. *Draper*[24] and other cases[25] be diluted by being made to depend on the service upon the landlord of a court order or equivalent undertaking by the husband?[26] It is, however, clear that, with regard to rented premises, the Recommendations would, in other respects, involve considerable improvements of the law: Not only would the protection be extended to the husband of a wife who is the tenant of rent-controlled premises, it would also apply where the tenant, instead of surrendering the tenancy, has himself terminated it,[27] and it would apply to non-controlled premises.[28]

In one respect the Royal Commission goes very much further than the present law in protecting the occupying spouse, and it is perhaps significant that it is in this respect that it makes its closest approach to what one may call the community principle. Under the present law the deserted wife can be evicted by a mortgagee if the husband-mortgagor, having left her, has stopped paying instalments.[29] Nor can the mortgagee be compelled to accept her offer to pay them. The Commission recommends that,[30] after having given proper notice to the mortgagor, the mortgagee should be bound to accept payments from the spouse who has remained in the matrimonial home, and this even after a divorce or nullity decree absolute until the premises have been disposed of by order of the court. A similar Recommendation applies to hire-purchase furniture and other equipment.[31] It would, however, be scandalous

23 The Commission regards the possibility of such an injunction as the solution of the problem—Para. 672—*sed quaere*.

24 [1944] K.B. 309, C.A.

25 *Middleton* v. *Baldock* [1950] 1 K.B. 657; *Old Gates Estates, Ltd.* v. *Alexander* [1950] 1 K.B. 311; *Wabe* v. *Taylor* [1952] 2 Q.B. 735. All these are decisions of the Court of Appeal.

26 Paras. 670–671, p. 182.

27 In this respect the law is not clear at present. See Para. 607, p. 165, and esp. note 15.

28 As the law now stands it appears that the wife of a tenant of non-controlled premises is unprotected against eviction by the landlord, no matter whether he or the husband-tenant has terminated the tenancy, although the Commission—see Para. 608, p. 166—surmises that the court (it is not quite clear on what basis) may help her where her husband has surrendered the remainder of a current term.

29 See *Lloyds Bank* v. *O*—— [1953] 1 W.L.R. 1460; *Barclays Bank* v. *Bird* [1954] Ch. 274; *Westminster Bank* v. *Lee* [1956] Ch. 7; Report Para. 676, pp. 182–183.

30 Para. 677, p. 183; Para. 686, p. 185. 31 Para. 680, p. 183; Para. 686, p. 185.

if on completion of the payments, *e.g.*, by the deserted wife, the husband became the unincumbered owner of the house or its contents. Hence the further Recommendations [32] that, in this event, the court should have the widest discretion to dispose of house, equipment or furniture, *e.g.*, order one spouse to convey his or her interest to the other on terms, order a sale and appropriate division of the proceeds, etc., and to do all these things even before the payments are completed. Why these sensible proposals should not also apply to spouses who have paid off the mortgage before the collapse of the marriage or whose house was not incumbered by a mortgage at all, is quite beyond comprehension, but an excessive respect for the institution of property in land prevented the Royal Commission from making appropriate recommendations,[33] whereas they did propose that the court should exercise a considerable amount of discretion in distributing between the spouses the chattels which form the contents of the home.[34]

The Royal Commission—and this is the crux of the matter—unanimously refused to recommend that any court should have " an unfettered discretion to deal with the matrimonial home and its contents " in the absence of a divorce or nullity decree or a separation decree obtained in the High Court.[35] In particular, they refused to recommend that such power should be exercisable by the magistrates on the making of a maintenance or separation order, not only because they considered the magistrates' court to be an unsuitable tribunal for this purpose—a point which could have been met by giving the power to the High Court or to a county court—but because, in view of the fluidity of such situations, this was regarded as a too far reaching inroad on the rights of ownership, and, in the case of rented premises, on those of the landlord.[36] The Recommendations on the ultimate destiny (as distinguished from the temporary use and occupation) of the matrimonial home and its contents are intended to govern the relations between the spouses when they have ceased to cohabit for good, *i.e.*, after a divorce, nullity or separation decree, thus introducing a regrettable distinction between the effect of a separation decree and that of a separation order which, under the present law [37] are identical.

Even at the time of, or after, making a divorce or nullity decree nisi or a separation decree the court (*i.e.*, the divorce court [38]) would have no power to allocate ownership in the home itself, whilst in divorce and nullity (but not separation) cases it could do so in

[32] Paras. 678–679, p. 183; Para. 686, p. 185.
[33] This is clear from the different treatment of the matrimonial home and its contents after a divorce, nullity or separation decree in Para. 687, p. 185, and Para. 692, p. 186, and also from the refusal to interfere with the tenancy of non-controlled premises: Para. 690, p. 186.
[34] Para. 697 (iii), p. 187.
[35] Para. 661, p. 180.
[36] Para. 658, Para. 660, pp. 179–180.
[37] Summary Jurisdiction (Married Women) Act, 1895, s. 5 (*a*).
[38] Para. 697, p. 187.

relation to its contents.[39] Except where the occupying spouse has discharged a mortgage, the discretionary power of the court over the matrimonial home would be restricted to allowing an "innocent" spouse, *i.e.*, the husband or wife who had obtained the divorce, nullity or separation decree, to reside in the matrimonial home.[40] Such an order would be made at or after the time of the decree nisi or separation decree. It would have to be applied for normally in the petition or answer, and after trial only with leave of the court, not usually to be granted more than three months after decree absolute,[41] and it would operate until the same court makes a further order. In the first place it would create no more than a right *in personam*, and the power to make such an order would primarily be regarded as a necessary extension of the power to make financial provisions between former spouses.[42] It would, however, be registrable as a charge on the land and then bind third parties. Where the "guilty" spouse is the tenant of the matrimonial home, or the spouses are joint tenants, the court, it is recommended, should have the power to transfer the tenancy to the "innocent" spouse, provided the premises are rent-controlled.[43] On the application of the "innocent" spouse the court would be able to allocate ownership (or in the event of a separation decree the use) of movable family assets, including hire-purchase articles.[44] So as to forestall dispositions by the owning spouse in favour of third parties, *ex parte* injunctions could be made and registered as land charges.[45]

The main purpose of these Recommendations was to come to the rescue of the wife who, as was said in evidence before the Commission,[46] "often puts up with her husband's gross ill-treatment because she fears that she will lose her home." This may perhaps explain why matrimonial "guilt" was allowed to intrude upon the equitable adjustment of property rights, an approach in terms of retribution to matters of distributive justice which is, however, characteristic of the attitude of the Commission. The ultimate destiny of the matrimonial home and its contents (a matter of great importance to the children) should not, it is submitted, hinge on who happened to emerge from the matrimonial proceedings as "guilty" and who as "innocent." Considerations of morality may

[39] *Ibid.*, and Paras. 687, 688, 691, 692, 693, pp. 185–186.

[40] Para. 694, p. 186: "We can see no justification for an interference with property rights in the matrimonial home and its contents for the benefit of a guilty spouse." Is the spouse who has obtained a nullity decree or a divorce by reason of the other spouse's insanity also "guilty" for this purpose? Does all this apply to the "guilty" spouse who has the custody of the children?

[41] Para. 695, pp. 186–187, and compare the Recommendations on maintenance and similar orders, implemented by s. 1 of the Matrimonial Causes (Property and Maintenance) Act, 1958.

[42] These are to be greatly extended: see Paras. 515–518, pp. 141–142.

[43] Para. 697, p. 187; Para. 689, pp. 185–186.

[44] Para. 697, p. 187; Para. 691, p. 186.

[45] Para. 698, p. 187.

[46] Para. 629, p. 171.

indeed be relevant, but the extent to which they should be allowed to enter into the matter should, as in the closely linked question of maintenance,[47] be left to the discretion of the court.

(c) *Towards a community of family assets?*

Any attempt to ascribe to spouses who live together an "intention" to allocate to each other stated proportions of the beneficial interest in family assets—an attempt never made, of course, before the marriage has collapsed—is, as the Master of the Rolls put it in a recent case,[48] surrounded by an "air of unreality." To operate with resulting trusts, with presumptions of advancements, and such-like devices, is as inopportune as it is to assume that, in arranging their household affairs, normal spouses enter into "contracts" in the legal sense.[49] The Recommendations of the Royal Commission show the extent to which the need for giving legal effect to the community of administration and enjoyment impressed itself on its members. Nevertheless, in the absence of a clear conception of a community the legal basis of these recommendations remains as obscure as is that of the corresponding principles evolved by the courts under the present law.

The Royal Commission recommended that the benefit of the exception to section 12 of the Married Women's Property Act, 1882, should be extended from the wife to the husband [50] so that he could sue her for the protection and security of his property. If he did, the court could protect the wife (just as it can now protect the husband) not on the basis of section 17 but only either in virtue of an implied licence to occupy the home or of matrimonial duties displacing proprietary rights. The Commission insists that her "right to remain in the matrimonial home until ordered to leave by the court should arise from the fact that she has been left in it by her husband," [51] and the same *mutatis mutandis* where it is the husband who was left there.[52] But why should the right to occupy the matrimonial home be based not on the matrimonial consortium but on its collapse? One might say, that, as hitherto the right to maintenance,[53] it is inherent in the consortium, but submerged as long as the spouses cohabit, and to this there would be no objection if the point was of merely academic importance.

This is, however, by no means the case. The odd notion that, by being left in the matrimonial home, a spouse acquires a right to

[47] The retrograde view that the "guilty" spouse should by law be deprived of a right to maintenance was rejected by a majority of thirteen against six members: Paras. 502–503, pp. 137–138.

[48] *Per* Lord Evershed M.R. in *Silver* v. *Silver* [1958] 1 W.L.R. 259, at p. 262.

[49] See *Balfour* v. *Balfour* [1919] 2 K.B. 571, C.A.

[50] Para. 704, pp. 188–189.

[51] Para. 669, p. 181. This is, of course, taken from the present law. See the cases quoted in note (10), *supra*, and especially the judgment of Denning L.J. in *Woodcock* v. *Hobbs*, *supra*, at p. 156.

[52] Para. 681, pp. 183–184.

[53] See, however, the fundamental change in the law of maintenance recommended in Para. 1049, p. 273.

remain there has the practical corollary that the spouse who has not been left there but been driven out can make no claim to get back.[54] The practical shortcomings of the recommendations to which attention was drawn above are connected with the lack of a clear conception of their legal foundation. If the spouses were, *inter se*, considered as beneficial joint owners the extent and incidents of whose mutual rights were subject to the discretion of the court, the court could help the spouse whose need was the greater not only by protecting him against eviction but also by evicting the other. Clearly this would be so if they owned the freehold, and a similar arrangement in the case of rented premises could not aggrieve the landlord if the spouses were made jointly and severally liable for the rent.

As with the right to occupy the home and to use its contents, so with the ultimate allocation of the right to ownership. The recommendations on the right of a spouse who has discharged a mortgage or paid off the amounts due for hire-purchase property, and also those on the powers of the court in the event of divorce, nullity and separation decrees look like fragments which require to be pieced together. They would find a proper place if it was recognised that in their mutual relationship the spouses have no absolute right to any family assets, but that in the absence of an agreement between them the court has a power to distribute them as is just and as is best from the point of view of the family and especially the children. There is no visible justification for treating the home itself otherwise than the chattels in it. Beneficially the spouses should, it is submitted, be considered as joint owners of undivided shares in " the things intended to be a continuing provision for them during their joint lives," [55] or what has been called the " matrimonial joint stock." [56]

[54] Paras. 656–661, pp. 179–180.

[55] This was the definition of " family assets " given by Denning L.J. in *Fribance* v. *Fribance* [1957] 1 W.L.R. 384 at 387.

[56] Expression used by Lord Evershed M.R. in *Silver* v. *Silver* [1958] 1 W.L.R. 259, at p. 261. One would have thought that even under the present law s. 17 of the Married Women's Property Act, 1882, gave to the court complete power to regulate between the spouses all questions of ownership, occupation and use with regard to all family assets, including the matrimonial home itself, certainly in the event of a judicial separation, and also in the event of a divorce or nullity decree, provided only the summons was issued before decree absolute (*Hichens* v. *Hichens* [1945] P. 23; *Fribance* v. *Fribance* [1956] P. 99). Not only did the Royal Commission envisage the continued existence of the provision that " in any question between husband and wife as to the title or possession of property " a judge should have power " to make such order with respect to the property in dispute . . . as he thinks fit," but they recommended (Para. 705, p. 189) to strengthen it by eliminating the effect of *Tunstall* v. *Tunstall* [1953] 1 W.L.R. 770 and by clarifying the court's power of sale, a recommendation which has been adopted in s. 7 of the Matrimonial Causes (Property and Maintenance) Act, 1958, s. 7. Did the Commission fail to see that, under the present law, all the orders it wishes to reserve to the Divorce Court and even those which it does not even wish the Divorce Court to make, can even now be made by a county court judge, and that, if so minded, a county court judge could help an evicted spouse to get back into the house

If this appears too rigid a rule, it should at least be laid down that, in the absence of evidence of a contrary intention, family assets should be treated as joint property. The present Lord Chief Justice said not long ago [57] that "in the present age" this was dictated by "common sense." Nor was this an isolated dictum. A mere glance at the recent case law shows that judicial opinion is developing in this direction, and where the court finds itself compelled to deviate from this principle and to operate, *e.g.*, with the presumption of advancement, it does so with palpable reluctance.[58] The law is moving towards a presumption of joint ownership of the beneficial interest in family assets and may soon overtake the somewhat timid proposals of the Royal Commission. If Parliament made this presumption explicit, it would not create a legislative artefact but, in the Socratic sense, perform the service of a "midwife."

If the law did no more than to establish a presumption of joint beneficial ownership, certain powers would nevertheless have to be reserved to the court to be exercisable irrespective of any agreement between the parties, such as, *e.g.*, to regulate the occupation of the house and the use of its contents. These should be, as they are now, considered as matters of public policy beyond the reach of any contrary agreement.

No more is submitted here than that the spouses should be considered or at least presumed to be joint owners of the beneficial interest the exercise of whose rights and the quantum of whose shares are subject to the discretion of the court. The legal title is a different matter.

Third parties, such as purchasers, mortgagees, and (subject to the Rent Acts) landlords,[59] should not be affected by the existence of the matrimonial community right in family assets, subject perhaps to a possibility of registering the community right in the matrimonial home as a charge on the land. This could be done on marriage or on the acquisition of the home, whichever the later, and such registration would make it possible to protect, *e.g.*, the deserted spouse against third parties. But the condition would be

which belongs to the other spouse? The two lines of Recommendations, *viz.*, those on s. 17 and those on the matrimonial home and its contents do not seem to have been co-ordinated. The present law, if properly interpreted, may be closer to a sensible regulation of the problem of family assets than the recommendations of the Royal Commission. This does not of course apply to the effect of such a regulation on third parties.

[57] In *Silver* v. *Silver* [1958] 1 W.L.R. 259, at p. 264.

[58] As in *Silver* v. *Silver*, *supra*. In view of what the Master of the Rolls called the "peculiar tragedy" of the case (at p. 260) the court was obviously in sympathy with the wife. Even so it was only with great reluctance that the court gave effect to the presumption of advancement (see esp. the short judgment of Sellers L.J. at pp. 265–266).

[59] There may, however, be a case for making the community right binding not only on personal representatives but also on trustees in bankruptcy. Otherwise the policy of protecting freedom of alienation which in the present law has clearly prevailed against the policy of protecting the "deserted wife" will inevitably preclude any change in the law to the detriment of third parties.

that her or his right was not deemed to arise on desertion but on marriage. It may be said, and said with reason, that a happily married couple will hardly think of registering a community right. Still, to do so might become habitual or even automatic. Cases have been known in which social *mores* have been shaped by the law, and neither the making of marriage settlements, once so common among the well-to-do in this country, nor the solemn *contrat de mariage* before the French notary, nor the registration of marriage contracts in Germany (at one time very usual in some parts of the country) has been known to impair matrimonial happiness or to contribute to the swelling of the divorce rate.

It may be arguable that the very nature of certain kinds of chattels, such as furniture, linen, silver, etc., indicates the likelihood of their dedication to family use, and puts the world on inquiry. There is indeed a strong case for treating such assets as joint property *erga omnes* and at the same time for laying down that, in relation to a creditor or trustee in bankruptcy of either spouse, they are irrebuttably presumed to belong to the debtor.[60] This would prevent either spouse from selling the household furniture without the other's consent,[61] but it would not enable them to defeat their creditors by shifting the property from the husband to the wife or vice versa, as the present law unfortunately allows them to do.[62]

4. *Summary*

The following submissions have been made in this article:

(1) Separation of property of husband and wife should, on principle, be maintained, *i.e.*, a system of community of goods should be rejected.

(2) An adaptation to English conditions of the principle of "community of surplus" is worth consideration. It would mean

[60] This is the ancient *Praesumptio Muciana* in the form it has now received in Para. 1362 of the German Code as amended by the above-mentioned statute of 1957.

[61] On this point too the new German law may be of interest: household goods may be owned by either spouse or by both jointly, but—Para. 1361a of the Code as amended—irrespective of the matrimonial régime under which the spouses live, jointly owned household goods are, if they live apart, distributed among them "in accordance with principles of equity" and either spouse must, in so far as it is equitable in the circumstances, leave to the other such of his or her household goods as the other requires to carry on a separate establishment, the court fixing a compensation for its use. After divorce the court has an even wider discretion under a Decree of Oct. 21, 1944, under which in the event of divorce—and only in this event—household property is presumed to be joint property. In one respect the new German law goes much further than the Recommendations of the Royal Commission: neither spouse can without the consent of the other spouse or that of the court sell or otherwise dispose of such of his own property as forms part of the content of the home, or even agree to do so (Para. 1369). The danger of the Recommendation of the Royal Commission is that the horse may have bolted when the court order tries to lock the stable door. The German law tries to keep it locked all the time. See for an analysis of these highly interesting new provisions the above-mentioned article by Mueller-Freienfels, at pp. 692 *et seq.*

[62] See an article by the present writer 16 M.L.R. 148 *et seq.* (April, 1953).

that, in the event of a factual or judicial separation of the spouses or of a divorce and in the absence of an agreement between the parties to the contrary, the surplus of their aggregate properties at that time over their aggregate properties at the time of their marriage would be equally divided between them, in so far as it is due to the work or thrift of either of them.

(3) Family assets, *i.e.*, the matrimonial home and its contents, should be considered or at least presumed beneficially to belong to the spouses jointly, the exercise of either spouse's right and the extent of his interest to be determined in its discretion by the court. Certain powers of the court should be exercisable in the family interest irrespective of any agreement to the contrary. Third parties should not be affected, but the legal estate should vest in accordance with the general principles of the law of property. The community right of the non-owning spouse might, however, be made registrable as a land charge.

(4) Beneficial joint ownership of family assets can be combined with a community of surplus. The submission on beneficial joint ownership refers to the use and allocation of specific assets, that on community of surplus to the ultimate accounting between the spouses. Any advantage gained by either spouse from a judicial determination of property in family assets might be taken into consideration in assessing the ultimate accountability between the spouses.

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THE LIABILITY OF INFANTS IN FRAUD AND RESTITUTION

THE object of this article is to explore the liability of infants in respect of fraud, and under the equitable doctrine of restitution, together with certain related matters. This subject has received scant treatment by the books on Contract. Cheshire and Fifoot on *Contract*, for instance, dismiss the subject in a little over a page.[1] Pollock, too, is content with a couple of pages,[2] and the accounts in Anson,[3] Halsbury[4] and Chitty[5] are all equally meagre. Only in Salmond and Williams[6] is a discordant note sounded on one or two points but even here the account occupies little more than two pages. Yet the last case on the subject was *R. Leslie, Ltd.* v. *Sheill*,[7] in 1914, since when the problem of restitution has received extensive analysis in *Sinclair* v. *Brougham*[8] and *Re Diplock*.[9] A re-examination of the matter, therefore, seems overdue.

Most of the books treat the problem as concerned exclusively with actions brought against the infant. In fact, however, equitable relief against fraudulent infants has been just as frequently invoked in actions brought by infants, and it is necessary to examine some of these cases before the far more complicated questions arising in actions against infants can be considered. Before we do this, however, we must decide what exactly is meant by "fraud" in this connection.

1. THE MEANING OF FRAUD

It is commonly stated that the equitable doctrine of Restitution is confined to those cases where an infant has committed common law fraud by falsely representing himself to be of full age when he was well aware that he was still an infant.[10] In fact the position is by no means so clear that a dogmatic statement of this sort is possible. In the first place the doctrine in question is an equitable one, and the equitable conception of fraud has always been much wider than

1 4th ed., pp. 345–346.
2 13th ed., pp. 63–65.
3 20th ed., pp. 136–137.
4 3rd ed., Vol. 21, pp. 148–149.
5 21st ed., Vol. 1, 605–608.
6 pp. 318–319.
7 [1914] 3 K.B. 607.
8 [1914] A.C. 398. To be quite accurate *Sinclair* v. *Brougham* was decided a few weeks before *Leslie* v. *Sheill*, but in view of the complexity of the problems raised by the former case, it was obviously impossible for them to be properly argued and considered in the later case, although Lord Sumner did give *Sinclair* v. *Brougham* a passing mention.
9 [1948] Ch. 465.
10 See, *e.g.*, Cheshire & Fifoot, *loc. cit.*, and Pollock, *loc. cit.*

the legal conception.[11] It is true that in an action based on fraud and nothing else, whether in law or in equity, common law fraud must be proved, but where the action is founded on some other right, or where fraud is set up by way of defence, in equity, at all events, fraud is not always restricted to wilful deceit. In the words of Lord Haldane in *Nocton* v. *Ashburton*[12]:

> "It must now be taken to be settled that nothing short of proof of a fraudulent intention in the strict sense will suffice for an action of deceit. This is so whether a Court of Law or a Court of Equity is dealing with the claim. . . . But where fraud is referred to in the wider sense in which the books are full of the expression, used in Chancery, in describing cases which were within its exclusive jurisdiction, it is a mistake to suppose that an actual intention to cheat must always be proved."[13]

When we turn to the authorities we find courts of equity frequently treating conduct as fraudulent which would not come within the common law conception of fraud. For instance, in *Clarke* v. *Cobley*[14] an infant persuaded the plaintiff to surrender some promissory notes signed by his wife, in return for a bond signed by the infant himself. The bond, of course, was void, and it was held that the infant must restore the promissory notes for his conduct had been fraudulent. The case is treated by Pollock on *Contract*,[15] and by Lord Sumner in *Leslie* v. *Sheill*[16] as though legal fraud were proved, but there is not one word in the report to confirm this suggestion. In other cases, which will be examined in more detail shortly, it has been uniformly held that an infant cannot stand by while his property is dealt with by a parent or guardian, and later impeach the transaction, although in none of these cases was there any suggestion of fraud in the legal sense.[17] Similarly, it has been held that if an infant beneficiary persuades his trustee to deliver trust property or money to him, he cannot, when he comes of age, make the trustee answerable for the same property again.[18] Again, in these cases there was nothing in the nature of fraudulent representations, yet the infant's conduct was held by court of equity to be fraudulent. It is submitted that these cases show that for an infant to attempt to obtain something for nothing is, in equity, fraudulent conduct.

[11] See Salmond & Williams, *Contract*, pp. 318–319.
[12] [1914] A.C. 932, at 953–954.
[13] It is true that Lord Haldane was primarily referring here to equitable cases of a fiduciary relationship, but the whole tenor of his speech shows that the conception of fraud in equity is not to be confined within a narrow formula as at law.
[14] (1789) 2 Cox 173.
[15] At p. 64.
[16] [1914] 3 K.B., at 617.
[17] See *Savage* v. *Foster* (1723) 9 Mod. 35; *Watts* v. *Creswell* (1714) 2 Eq.Ca.Ab. 415, *infra*.
[18] See *Cory* v. *Gertcken* (1816) 2 Madd. 40, and other cases cited *infra*.

The difficulty has been caused by subsequent cases in which adult plaintiffs attempted to persuade courts of equity that mere non-disclosure by an infant of his infancy, was *per se* fraudulent. This the courts have consistently refused to do. For instance, in *Stikeman* v. *Dawson* [19] an infant sold some shares, through his brokers, to the plaintiff, but after signing the transfer and delivering the share certificate, the infant's father notified the company that he was an infant and they refused to register the buyer as the owner of the shares. The buyer had paid the price of the shares but the infant in fact never received the money because it was paid to his brokers, and they retained it in part payment of a debt alleged to be due to them from the infant—a debt which they could almost certainly not have recovered at law. It was held by Knight Bruce V.-C. that the infant could not be compelled to permit the buyer to be registered as the owner of the shares, as he had done nothing fraudulent. The mere fact that he had not disclosed that he was an infant was not fraud. But the vital feature of the case, it is submitted, is that the infant never received the price of the shares, and was therefore not doing anything unconscionable in refusing to part with them. Mere concealment of the fact that one is an infant is not *per se* fraudulent but that does not mean that there is no way of committing fraud except by falsely representing oneself to be of full age.

The same is true of the later case of *Re Jones* [20] where it was sought to persuade the court that an infant trader impliedly represents that he is of full age, and that mere concealment was therefore tantamount to fraud. Again, the argument was rejected by the Court of Appeal,[21] and a casual reading of the case might suggest that the court committed itself to the view that there must be an express fraudulent misrepresentation that an infant is of age, to constitute fraud. But when the judgments are read in the light of the arguments it is submitted that it is clear that the court was not intending to lay down that there is no other way of committing fraud. After all, an infant may commit even legal fraud in ways other than by misrepresenting his age. The same is also true of some of the remarks in *Leslie* v. *Sheill*.

It is submitted, therefore, that there is nothing in the later cases which detracts from the authority of the earlier cases, and these clearly show that for an infant to attempt to obtain something for nothing is, in effect, fraud in the eye of equity. For instance, if an infant buys non-necessary goods, and refuses to pay for or return the goods, it is submitted that this is fraud. That is not to say, of course, that an action will lie for such fraud. What we have been attempting to establish so far is merely what constitutes

19 (1847) 1 De G. & Sm. 90.
20 (1881) 18 Ch.D. 109.
21 "Does a boy who sells oranges in the streets hold himself out to be of full age?"—*per* Jessel M.R. at p. 117.

fraud for the present purpose. It is now necessary to see what precisely is the result of such fraud, and we must now distinguish between cases in which the infant is the plaintiff and cases in which the infant is the defendant.

2. Actions by Fraudulent Infants

It was settled early in the eighteenth century that an infant could not stand by and allow his father or guardian to deal with his property, and afterwards impeach the transaction. For instance, in *Savage* v. *Foster*[22] an infant entitled to certain lands in remainder after her mother's death was actively concerned in a conveyance of the lands by her mother to her sister's husband, and it was held that it would be fraudulent of her to set up her title against a purchaser from the husband. In *Watts* v. *Creswell*[23] an infant similarly entitled in remainder to lands on his father's death witnessed a mortgage of the land by his father, and was held bound by it, despite the fact that he did not know that the mortgage related to the land to which he was entitled in remainder. It may be that this case went too far in holding the infant bound despite his lack of knowledge of the contents of the deed he was witnessing,[24] but the principle, at any rate, is clear.[25]

These decisions had nothing to do with contract, and indeed, had little to do with infants, except insofar as they show that equity's jurisdiction to deal with what it regarded as fraud did not stop short of dealing with infants. Later this defence of fraud was extended to cases where an infant beneficiary obtained a transfer of trust money or property, and then sought to make the trustee answerable for his action after he came of age. In these cases it has been uniformly held that it would be fraudulent of the infant to attempt to make the trustee answerable for the same money or property twice over.[26]

As we have said, these cases have little to do with contract, but it is not difficult to extract from them a principle that is capable of applying to cases of contract, and such a principle was in fact extracted by Lawrence J. in the Court of Appeal in *Leslie* v. *Sheill*. After dealing with some of the cases to which we have referred, the learned judge there said:

> "There are no doubt many cases in which equity will give relief against frauds perpetrated by infants. Wherever the infant requires as a plaintiff the assistance of any court, it will be refused until he has made good his fraudulent representation."[27]

[22] (1723) 9 Mod. 35.
[23] (1714) 2 Eq.Ca.Ab. 415.
[24] See Lord Thurlow's remarks in *Beckett* v. *Cordley* (1783) 1 Bro.C.C. 353.
[25] See also *Earl of Buckingham* v. *Drury* (1761) 2 Eden 60.
[26] *Cory* v. *Gertcken* (1816) 2 Madd. 40; *Overton* v. *Bannister* (1844) 3 Ha. 503; *Wright* v. *Snowe* (1848) 2 De G. & Sm. 321.
[27] [1914] 3 K.B., at 626.

Lawrence J. then pointed out that equity would also compel an infant to restore any property obtained by fraud, but that neither of these principles was sufficient to avail the plaintiff in the case itself. Assuming, then, that this principle is good law, we may next examine the possible applications of it in the law of contract. Four cases may be considered, namely, necessaries, voidable contracts, contracts of loan, and contracts for non-necessary goods.

(1) *Necessaries*

Since an infant is bound by a contract for necessaries, at all events where it is executed, there seems no reason why legal fraud on the part of the infant should not give the other party normal contractual remedies. Thus if common law fraud is proved against the infant the adult should be able to rescind the contract, whether executory or executed, and in the latter event he should be entitled to recover any goods delivered, subject to the rights of a bona fide purchaser. Even if the infant's liability in these cases is quasi-contractual, the answer should still be the same for the adult's liability is presumably contractual, and it is he who is claiming the right to rescind for fraud. There also seems no good reason why the adult should not be able to recover damages in an appropriate case for plain common law fraud, because the infant's usual immunity from such an action is based on the rule that a void contract cannot be indirectly enforced, and here we are dealing with something which is not a void contract. It may be, however, that the infant's liability in such an action would depend on the answer to the still unresolved question of the true basis of the infant's liability to pay for the necessaries. This is a question beyond the scope of the present article.

If fraud short of common law fraud is proved, the position is not quite the same. Here the adult certainly cannot sue the infant, but if the infant were to sue the adult, *e.g.*, for breach of a condition implied by the Sale of Goods Act in respect of the goods, equitable fraud might be a defence. It is not easy to imagine such a case, however, for if the infant fails to pay the price of necessaries and claims damages for breach of condition, the adult could simply bring a counterclaim for the price. Thus it would be unnecessary to invoke fraud.

(2) *Voidable contracts*

The position in cases of voidable contracts seems to be substantially the same as in cases of necessaries. If, for instance, an infant obtains a lease of a house by a fraud, it is submitted that the adult is entitled to rescind the contract and recover the possession of the house. Again, equitable fraud, although theoretically it may be available as a defence, is not likely to prove of importance in practice in such a case.

(3) *Contracts of loan*

A contract of loan is, of course, one of the contracts declared to be " absolutely void " by section 1 of the Infants Relief Act, 1874. In practice there are two sets of circumstances in which an infant may wish to bring an action on, or connected with, a void loan.

(a) *Recovery of securities.* If the infant has deposited securities in respect of the loan, and he sues the adult for the recovery of the securities, would fraud on the part of the infant be a defence, and if so what kind of fraud? It may be said at once that there is no doubt that a security given by an infant in respect of a void loan is itself void,[27a] so that there is no question of the adult realising his security. At the same time, there is no decision which would prevent a court refusing to help an infant seeking to recover securities where he has been guilty of plain fraud, and there are, as we have seen, innumerable dicta which would bar the infant's action. It is submitted that to refuse to help the infant in such circumstances until he has made good his fraud as far as he is able (*i.e.*, in practice by repaying the loan) is not contrary to anything in the Infants Relief Act. The loan is void and the security is void, and neither can be enforced by the adult, but that is no reason why a court should not require the loan to be repaid as the price of granting its assistance to an infant guilty of fraud.

Whatever the position in cases of legal fraud, it seems clear that merely to refuse to repay the loan, even if it might have been considered fraudulent in equity, cannot be a defence to an action by the infant to recover his securities. The court cannot say that it is inequitable for an infant to refuse to repay a loan declared void by statute.[28]

(b) *Loans made by cheque.* The second possibility is that an adult might be induced by an infant to lend him money and he might give him a cheque in respect of the loan. Suppose that the adult then discovers that the other party is an infant, and then stops the cheque, is it possible that the infant would be entitled to sue on the cheque and recover payment of a loan which he will not have to repay? It is submitted that it would be a good defence to such an action to plead fraud in either its legal or equitable connotation, and from the point of equity it is probable that the mere attempt to sue on the cheque would *per se* be regarded as fraudulent, unless perhaps the infant could provide

[27a] *Nottingham Permanent Benefit Building Society* v. *Thurstan* [1903] A.C. 6.

[28] See *Thurstan* v. *Nottingham Permanent Benefit Building Society* in the C.A. [1902] 1 Ch. 1, especially *per* Romer L.J. at p. 13. See also *Chapman* v. *Michaelson* [1909] 1 Ch. 238; *Cohen* v. *Lister* [1939] 1 K.B. 504; *Kasumu* v. *Baba-Egbe* [1956] A.C. 539, but *cf. Lodge National Union Investment Co.* [1907] 1 Ch. 300. The distinctions drawn in these cases do not touch the question of actual fraud.

some form of security which would not be invalidated by the Infants Relief Act, *e.g.*, a person prepared to enter into a contract of indemnity with the lender. Once again it may be pointed out that there is no question of permitting the lender to enforce a void contract of loan, but merely of refusing to permit the infant to enforce it when it would be unconscionable for him to do so.

(4) *Sale of non-necessary goods*

The last case to be considered is the possibility of an infant buying non-necessary goods, a contract declared once again to be absolutely void by the Infants Relief Act. Despite the words of the Act it is still the predominant opinion among writers that an infant can enforce such contracts against the adult, *i.e.*, that the contract is void as against the infant only.[29] If this is so, however, it is submitted that an action by the infant would again be barred by fraud, and again fraud in its equitable or legal connotation should suffice. For instance, if an infant buys non-necessary goods and, without paying for them, proceeds to sue the seller for breach of some condition implied by the Sale of Goods Act in respect of the goods, would it not be open to the seller to plead that the infant had not paid for the goods and that equity would regard it as fraudulent of the infant to attempt to get the benefit of the contract without accepting its burdens? It has been suggested that this would be to "enforce a void contract,"[30] but it is submitted that this is not so. It is simply to insist that the adult's promise was given in return for the infant's promise, and that even if the infant's promise is not enforceable, he is not entitled to enforce the adult's promise without performing himself. Indeed, it is hard to see how, on normal rules of pleading, the infant could do this, for a person suing on a contract must normally show that he has performed his own duties under the contract, or else that he is ready and willing to do so. The cases cited by the learned writer, whose views we have just quoted,[31] are all distinguishable because in those cases there was no question of the contract being enforced by anybody. Thus, an infant who seeks to recover securities deposited in respect of a void loan can recover them, as we have seen, without having to repay the loan, because he has a cause of action independent of the contract. He is simply seeking to recover his property. The position is in some respects analogous to the case where a person seeks to recover property delivered under an illegal transaction. Here it was settled by the Court of Appeal in *Bowmakers* v. *Barnet Instruments*[32]

[29] See, however, an article by G. H. Treitel in 73 L.Q.R. 194, with a reply by the writer in 74 L.Q.R. 97, and Treitel's comments thereon, *ibid.*, 104.

[30] 74 L.Q.R., at 105.

[31] p. 278, note 28, *ante*. All these cases were concerned with recovery of securities from moneylenders under void or unenforceable contracts.

[32] [1945] K.B. 65.

that the property can be recovered if there is no need to rely on the illegal contract, if, in other words, there is a cause of action independent of contract. But the position is quite different where the infant is seeking to sue the adult in respect of a cause of action founded on the contract and the contract alone, but at the same time pleads that he is not bound to perform his own obligations under the contract. It is submitted that the equitable principle we are discussing is quite wide enough to meet this case, and that to apply it in such circumstances would be no violation of the Infants Relief Act.

3. Actions Against Fraudulent Infants

We now turn to consider the far more complicated questions which arise when an adult is seeking in some way or another to obtain redress from the infant in respect of fraudulent conduct. The particular problem which requires consideration here is to what extent, and in what circumstances, can an adult recover goods or money delivered to an infant under a void contract. At the outset, it is reasonably clear that four possible lines of attack are open to the adult: (1) an action in contract; (2) an action in tort; (3) an action in quasi-contract; and (4) an action for the recovery of property. These four possibilities must be examined in turn.

(1) *Action in contract*

This line of attack has been consistently barred to the adult where the contract itself is void. Even if the infant has been fraudulent, the other party can still not enforce the contract as such. Nor is it open to the adult to meet a defence of infancy by pleading that he was induced to enter into the contract by fraud,[33] nor again can the adult claim that the infant is estopped from pleading his infancy as a result of an assertion that he was of full age.[34] On the other hand, if the contract was valid, *e.g.*, being for necessaries, it can, of course, be enforced by the other party, fraud or no fraud. Hence, in a straight action on the contract, fraud is irrelevant.

(2) *Action in tort*

The general principle is, of course, that an action in tort which is quite independent of any contract lies against the infant just as against anybody else, but the infant cannot be sued in tort where the alleged tort was something within the scope of a contract not enforceable against the infant. From a very early time it has thus been settled that an action against the infant for inducing the

[33] *Bartlett* v. *Wells* (1862) 31 L.J.Q.B. 51; *De Roo* v. *Foster* (1862) 12 C.B.(N.S.) 27.

[34] *Levene* v. *Brougham* (1909) 25 T.L.R. 265; *Leslie* v. *Sheill* [1914] 3 K.B. 607.

other party to contract with him by fraudulent misrepresentation will not lie whether the action is cast in contract or tort.[35]

So far the law is clear. What is not so clear is whether a straight action in tort for the recovery of non-necessary goods can be brought against the infant, at any rate where he has not paid the price. It is generally assumed that such an action does not lie,[36] and if it does, it is certainly strange that there is no case to illustrate the possibility. Still, the point cannot be regarded as free from doubt, especially as it is still unsettled whether the property in non-necessary goods passes to an infant under a contract of sale. If the property passes (as Lush J. thought in *Stocks* v. *Wilson*[37]) then it is clear that no action can be brought for converting or detaining what belongs to the infant. If, on the other hand, the property does not pass, why cannot the seller sue in detinue or conversion? It is, of course, true that the adult cannot by suing in tort indirectly enforce the contract, but an action of this kind seems to be the very reverse of enforcing the contract. The adult is repudiating the contract on the ground that he has not been paid, and is seeking to set it aside and recover his property: this is an odd way of enforcing a contract. There are, however, difficulties in the way of this course which it is unnecessary to examine in detail,[38] because, as we shall hope to show shortly, if the property does not pass to the infant the adult has a much stronger claim in equity.

(3) Action in quasi-contract

The position in quasi-contract is very similar to that in tort. The infant can be sued in quasi-contract where the cause of action is quite independent of any contract, *e.g.*, for the recovery of money embezzled by an infant employee.[39] On the other hand, it is clear that the infant cannot be made to restore money in quasi-contract where to make him do so would be tantamount to enforcing a void contract. Thus the infant cannot be sued for repayment of a loan in quasi-contract. It matters not whether the true basis of the action is an imputed promise, or merely a legal obligation based on the idea of unjust enrichment. In the former event, the law cannot give an imputed promise any greater validity than an express promise, while, in the latter event, the courts cannot declare that the enrichment is unjust when Parliament has ordained that the infant is not bound to make it good.[40]

There is, however, no objection to holding an infant liable in quasi-contract, even though the action is connected with a contract,

[35] *Johnson* v. *Pye* (1675) 1 Sid. 258; *Price* v. *Hewitt* (1853) 8 Ex. 146.
[36] See *e.g.*, Cheshire & Fifoot, *Contract*, p. 341.
[37] [1913] 2 K.B. 235, at 246–247.
[38] In particular the form of the judgment in detinue or conversion would come close to enforcing the contract.
[39] *Bristow* v. *Eastman*, 1 Esp. 172.
[40] See, generally, *Sinclair* v. *Brougham* and *Leslie* v. *Sheill*.

provided that the action is not used as an indirect way of enforcing the contract. For instance, if an infant sells goods, and the price is paid but he fails to deliver the goods, he obviously cannot be sued for damages for non-delivery, but is there any reason why he should not be sued for the return of the price in quasi-contract? In *Cowern* v. *Nield*[41] a Divisional Court held that if the adult could prove fraud he would be entitled to succeed, as the action would then be, in substance, *ex delicto*. With respect, this appears to be doubtful for, as we have seen, fraud based on and connected with a contract is in any case not actionable, whether *ex contractu* or *ex delicto*. It is submitted that the quasi-contractual liability is quite independent of fraud, and that there is no objection to allowing an action in quasi-contract in such a case as that put here, because the fact that the contract is void is no reason why a quasi-contractual obligation should not arise. If the obligation is based on unjust enrichment there is no difficulty in finding the enrichment to be unjust, while if the obligation is based on an imputed promise, there is no difficulty in holding the infant liable on an imputed promise which is quite a different one from that declared void by law.[42]

(4) *Action for the recovery of the property*

We have now cleared the way for an examination of the most difficult part of this article, namely, the circumstances in which an action for the recovery of property lies against the infant. Much as one may sympathise with the remarks of Denning J. (as he then was) in *Nelson* v. *Larholt*[43] to the effect that rights should now be considered in the light of the joint principles of law and equity, it must be confessed that this is a counsel of perfection. In a complex subject of this nature one must approach the rights through the two different systems in the first place, although it may eventually be possible to explain their combined effect. Let us turn first, then, to actions for the recovery of property at law.

(a) *Actions at law.* Actions at law for the recovery of goods need not detain us long, because although it is common to speak in a general way of such actions, there are, in fact, none. As we have seen there are only the actions of conversion and detinue, *i.e.*, actions in tort, and the availability of these actions depends on the principles already discussed. We have already pointed out that these actions plainly do not lie in respect of goods the property in which has passed to the infant, and it is even doubtful whether they lie where the property has not passed.

We turn next to common law actions for the recovery of money.

[41] [1912] 2 K.B. 419.
[42] See *per* Lord Parker in *Sinclair* v. *Brougham* [1914] A.C., at 440.
[43] [1948] 1 K.B. 339, at 343.

Now a common law action for the recovery of money took, of necessity, the form of an action for money had and received, for the simple reason that there was no other available action which could meet the case. It is, however, vital to note at the outset that the action for money had and received fell into two distinct legal categories. On the one hand there was the normal quasi-contractual type of the action, and on the other hand there was the strictly proprietary action. In the former case the plaintiff asserts a claim *in personam* to money which legally and equitably belongs to the defendant, but which he is under an obligation to pay to the plaintiff. Success in an action of this kind leads to an ordinary judgment against the defendant for payment of a sum of money. In the proprietary form of the action, however, the claim is to recover property which legally belongs to the plaintiff. The action asserts no obligation on the part of the defendant, and if it is successful the judgment will not be a personal judgment against the defendant, but a judgment that a certain fund of money belongs to the plaintiff and that he is entitled thereto. This means that the plaintiff must claim a specific sum of money which exists somewhere, and if that sum is inadequate to meet his claim he cannot recover the balance from the defendant. It also means that the plaintiff can recover the money despite the insolvency of the defendant, provided that the sum he claims is intact and has not been mixed with other money belonging to the defendant. It follows also that if the whole sum in question has disappeared, or has been spent, the plaintiff loses his only right.

The distinction between the quasi-contractual right and the proprietary right is most clearly brought out by a consideration of the well-known case of *Sinclair* v. *Brougham*, to which we have referred several times already. In this case, a building society had carried on large-scale banking activities which were held to be *ultra vires*. Money deposited with the society was thus, in the eye of the law, money lent to the society on a void contract. Manifestly, no action lay for the recovery of the money in an ordinary action on the loan. Nor, it was held, could the depositors claim the recovery of their money in quasi-contract for, as we have pointed out already, whatever the true basis of quasi-contract, it is impossible to evade legal prohibitions on certain contracts of loan by enforcing them quasi-contractually. This, however, did not preclude the possibility of the depositors recovering their money on the simple claim that the money had never ceased to be theirs, although for reasons which will be apparent shortly, the claim had to be made on equitable and not legal grounds. The speech of Lord Haldane [44] in this case contains the fullest and clearest exposition of the right to recover money

[44] Lord Atkinson concurred with Lord Haldane.

in a proprietary action at law, although, in one respect, his opinions have been qualified by later cases.

In Lord Haldane's view, the right to claim or follow the money at law exists where the property in the money has not passed, and that in turn depends on showing that a creditor-debtor relationship has not come into existence. "Whether the case be that of a thief, or of a fraudulent broker, or of money paid under a mistake of fact,[45] you can, even at law, follow, but only so long as the relation of debtor and creditor has not superseded the right *in rem*." [46] What we are at present concerned with is the application of these remarks to the case of infants. Since an infant's loan is void, it seems to follow that his position is very analogous to that of a company which has borrowed money on an *ultra vires* contract. In both these cases the loan is void for lack of contractual capacity. In both cases quasi-contractual remedies are not available. In the case of the company the money can be followed at law, since there is no debtor-creditor relationship. Is this not equally true of infants' contracts of loan? Since the loan is void at law, how can there be a debtor-creditor relationship? And if there is none, is there any reason why the money should not be followed? It is submitted that there is no reason whatever why the money should not be followed at law in the case of void loans to infants, just as in the case of void loans to companies.

Now if money can be followed at law, it is submitted that the question of fraud is wholly irrelevant. The money can be followed because it belongs to the plaintiff, and if it belongs to him it must do so whether or not the infant is fraudulent. So also, it is submitted that it is unnecessary to show any fiduciary relationship between the plaintiff and the defendant in an action at law, although, as we shall see shortly, it may be necessary to do so in equity. To quote again from Lord Haldane in *Sinclair* v. *Brougham* [47]:

> "My lords, it is, in my opinion, impossible to confine the right at law to follow to cases where there was a fiduciary relationship. The principle appears to me to cover all cases where the property in the money has not passed, and the money itself can be earmarked in the hands of the person who wrongfully obtained it."

As Lord Haldane then proceeded to point out, since common law did not recognise any special duties appertaining to fiduciary relationships, the principle obviously could not depend on such a relationship.

[45] It may well be that Lord Haldane went too far in equating cases of money paid under a mistake of fact with the others, because it seems that in this case a creditor-debtor relationship *does* supersede.

[46] [1914] A.C., at p. 419.

[47] [1914] A.C., at p. 420.

We have already pointed out that a claim of this kind, being a claim *in rem*, can only be successfully prosecuted if there is some specific sum of money which can be claimed. It is now necessary to consider how far the money can be followed at law. The obvious, and at once the most difficult, case is where the recipient pays the money into his bank account. Is it possible to follow the money into the bank? Lord Haldane apparently thought not, on the ground that common law could not identify the money in the bank. On the other hand, the Court of Appeal in *Banque Belge* v. *Hambrouck*[48] thought that so long as the money paid into the bank account was not "mixed" with any other money it could be identified, and this view also commended itself to the Court of Appeal in *Re Diplock*.[49] In this last case the Court of Appeal pointed out that what happens when money is paid into a bank account is that the payer in effect "buys" a chose in action, *i.e.*, a debt, from the bank to himself, and they added: "If it is possible to identify a principal's money with an asset purchased exclusively by means of it, we see no reason for drawing a distinction between a chose in action, such as a banker's debt to his customer, and any other asset."[50] With all respect, however, it may be suggested that there is a difference between the case of buying an asset and "buying" a chose in action, although the difference does not relate to identification. The difficulty, surely, is that when the money is paid into a bank account the legal title to the chose in action is vested in the payer. This must be so, for clearly the bank will only be bound to repay the money to the person who paid it in (unless, of course, a court otherwise directs). Hence, even if the original owner of the money may have some equitable claim to the chose in action, it is difficult to see how he can follow it at law. The position is otherwise where the money has been used to buy some tangible asset, for here there is no difficulty in regarding the original owner of the money as having the legal title to the asset. This distinction between following at law and following in equity has by no means lost its importance since the Judicature Acts, for the equitable claim rests on a different basis and may not always be available whenever the legal claim is available. Nonetheless, it is submitted that there is no reason why a person claiming to follow the money or property should not be able to claim the help of the combined principles of common law and equity, although this possibility does not yet seem to have been acted on. But more of this when we turn to the claim in equity.

So far we have been considering simple claims to follow money lent to an infant on a void contract. The position may, however, be more complicated. Suppose that the infant buys non-necessary

[48] [1921] 2 K.B. 321.
[49] [1948] Ch. 465.
[50] [1948] Ch., at p. 519.

goods and then sells them, can the proceeds of sale be claimed at law by the seller of the goods? If the legal title to the goods had passed to the infant it seems that he must have obtained the legal title to the money which he has received for them, and that there can be no following at law. On the other hand, if the position is that the legal title to the goods never passed to the infant, it is submitted that there should be no difficulty in following the proceeds of sale even at law, subject to the difficulty we have already mentioned where the money is obtained by a cheque paid into the infant's bank account. Suppose, again, that the goods have been exchanged for other goods, or sold, and other goods bought with the proceeds. Here we are on more tricky grounds because of the fact that an action for the recovery of goods must take the form of an action in tort. Still, it is submitted that even if the original goods could not have been recovered at law, any other goods into which they have been changed, directly or indirectly, can be so recovered. The point is that once the original goods are gone, there can be no question of indirectly enforcing the contract by an action in tort for the new goods.

To sum up, then, on this part of the problem: where an infant obtains money under a void contract there is no reason whatever why the lender should not avail himself of the right to follow the money at law, a right which occurs wherever the debtor-creditor relationship does not arise. This right does not depend on fraud, or on a fiduciary relationship being established, although it does, of course, depend on the money or its proceeds being identifiable, and it depends on the lender being able to establish a legal title, and not merely an equitable title, to the money.

(b) *Action in equity.* We now turn to examine the application of the principles of "following" property in equity, to contracts whereby infants have acquired goods or money. We are faced at the outset with two requirements, or alleged requirements, for the application of these principles, the first of which appears to be peculiar to infants, and the second of which is common to all cases of following in equity. The first requirement is that the infant must have been fraudulent, while the second is the existence of a fiduciary relationship.

It is commonly stated that in order to invoke the equitable doctrine of restitution against an infant, fraud must be proved. In fact, however, it is submitted that there is no such requirement, or, that if there is, then merely refusing to pay for goods, or to repay a loan, is itself fraudulent.[51] We prefer to say that the requirement is non-existent, however, because we have already pointed out difficulties in the way of saying that it is fraudulent to refuse to repay a loan declared void by statute. Three reasons may be given in support of this conclusion. In the first place, as a

[51] This is the view taken in Salmond & Williams, *Contract*, pp. 318–319.

matter of principle, it is hard to see why fraud should be relevant in an equitable action of following, any more than in a legal action. The action is based on proprietary rights; the plaintiff claims that in equity the property or money belongs to him and not to the infant, and if this is so, why should it be necessary to prove that the infant has been fraudulent? In the second place, the equitable doctrine of tracing or following has received exhaustive analysis this century in *Sinclair* v. *Brougham* in the House of Lords and in *Re Diplock* in the Court of Appeal, and in neither of these cases is there the slightest suggestion that fraud is a requirement of the doctrine. It is true that neither of these cases had anything to do with infants (although, as we have pointed out, the analogy between infants' contracts of loan and *ultra vires* contracts of loan made to companies is very close), but if the principle is the same, and in both these cases the principle is stated as one of general application, it is hard to see why the requirements of the principle should not always be the same. Moreover, *Clarke* v. *Cobley*, to which we have already referred, is a clear authority in favour of the present submission. In the third place, it seems probable that the constant references to fraud in this connection have arisen from a confusion of two principles. On the one hand there is the principle that equity will not permit an infant to take advantage of his own fraud *in an action brought by him*, and on the other hand there is the principle we are now considering, which is simply that a person is entitled to recover property or money belonging to him. It is submitted that a careful reading of *Leslie* v. *Sheill* shows this to be the true view, although that case is usually cited as authority for the proposition that actual fraud must be proved.[52]

In *Leslie* v. *Sheill* the infant defendant had induced the plaintiffs to lend him £400 by fraudulently representing himself to be of full age. The plaintiffs claimed against him under two heads: (i) damages for fraudulent misrepresentation, and (ii) recovery of the money in quasi-contract. Both these claims manifestly failed on the principles and authorities we have already discussed. It was with reference to these claims that the court cited and dealt with the many cases dealing with the jurisdiction of courts of equity to grant relief against fraud practised by infants. The court did not dissent from these cases, but merely pointed out that none of them went to the length of enabling the adult to sue the infant to recover payment of the loan. On the contrary, as we have sought to show, these cases merely establish that fraud on the part of the infant may be a defence to an action by the infant. We have already submitted, too, that this case does not lay down that an infant cannot commit fraud except by fraudulently misrepresenting his age, but merely that non-disclosure of one's age cannot *per se* be

[52] Another case frequently relied on for this proposition is *Stikeman* v. *Dawson*, but we have shown this to be a case not of restitution, but of an action to compel, in effect, the specific performance of the contract.

fraud. During the argument of *Leslie* v. *Sheill*, however, a third claim was submitted on behalf of the plaintiffs, and this was the claim to follow the money *in rem*, a claim which was acceded to by the judge in the court below. But, as the Court of Appeal pointed out, to this claim there was one conclusive answer, namely, that the infant had spent the money. In the words of Lord Sumner:

> "The money was paid over in order to be used as the defendant's own, and he has so used it, and, I suppose, spent it. There is no question of tracing it, no possibility of restoring the very thing got by the fraud, nothing but compulsion through a personal judgment to pay an equivalent sum out of his present or future resources, in a word, nothing but a judgment in debt to repay the loan. I think this would be nothing but enforcing a void contract." [53]

It is submitted that there is nothing in this passage to suggest that Lord Sumner thought that fraud was a necessary requirement for the application of the principles of following, to infants' contracts. It might, indeed, be possible to argue that the presence of fraud gives the other party more extensive rights of recovery than those conferred by the principles of following property, *e.g.*, it might not be necessary to establish the existence of a fiduciary relationship if there is actual fraud. There is no conclusive answer to this possibility, but it is questionable whether it is necessary to have a separate doctrine of restitution for fraud, differing from the general principle governing the following of property, but covering substantially the same ground. In any case, as we hope shortly to show, the necessity for establishing a fiduciary relationship should not prevent property or money being recovered from an infant even in the absence of actual fraud. It is to this question that we now turn.

In both *Sinclair* v. *Brougham* and *Re Diplock* the courts emphasised that, for the equitable principles of following property to be available, it is necessary to establish a fiduciary relationship between the person who delivered the property, or paid the money, and the recipient. Although it is obviously too late to doubt this as a general rule, it is submitted that it does in fact little to restrict the right to follow. Two points may be made on this question.

First, the reason why a fiduciary relationship must be established is to show that some equitable right of property persisted even after the goods or money had been delivered. This is quite clear from the speeches in *Sinclair* v. *Brougham* and the judgment in *Re Diplock*. But if this is the reason it is submitted that it is unnecessary to show that a fiduciary relationship existed where the legal title to the property or money has not passed, for in this case the right of property still exists at law, and it may indeed be followed at law. But as we have seen, the right to follow at

[53] [1914] 3 K.B., at p. 619.

law is defeated once the money is mixed in a bank account with other money. Is there any reason, then, why equity should not assist at this point without also insisting on its usual requirement of a fiduciary relationship being established? It is suggested that there is no reason at all why equity should not lend its aid to follow the money into a mixed account, even in the absence of a fiduciary relationship, provided that the legal title to the property or money did not pass when it was delivered or paid.[54] If, for instance, an adult lends money to an infant by giving him a cheque, it is submitted that no title passes to the cheque in the first instance, and the adult could stop payment on it if he chose. If, therefore, the infant pays the cheque into an existing account at his bank it is submitted that the adult should be entitled to follow the money into the bank in equity despite the absence of any fiduciary relationship.

In the second place, even if some kind of fiduciary relationship is always necessary, it must be said that it is not at all clear what gives rise to the relationship. After all, in *Sinclair* v. *Brougham* the fiduciary relationship was of a most peculiar character. For one thing, the insistence by the Court of Appeal in *Re Diplock* on the different identities of the society and the directors in *Sinclair* v. *Brougham* was extremely artificial. The court insisted that the money in that case was received by the directors and then mixed with the society's own money. No doubt this is the logical conclusion of the doctrine of *ultra vires*, but it attributes to the directors a part much larger than that which they probably played in fact. A good deal of the money deposited with the society was presumably paid by cheques drawn in favour of the society, and in this case it is hard to see in what sense the money was ever received by the directors at all. Thus, leaving aside technicalities, there does not seem to be much difference between lending money to an infant on a contract which he cannot make and lending money to a company on a contract which it cannot make. However, even if this argument is rejected, as it might have to be in the light of the *Diplock* case, it still remains to be seen why a fiduciary relationship was held to arise in *Sinclair* v. *Brougham*. This point was, in fact, dealt with very cursorily by the House of Lords, and only Lord Haldane makes it quite clear why he thought that a fiduciary relationship existed. Thus, he said:

> "The property was never converted into a debt, in equity at all events, and there has been throughout a resulting trust, not of an active character, but sufficient, in my opinion, to bring the transaction within the general principle."[55]

[54] This suggestion is supported to some extent by *Banque Belge* v. *Hambrouck* [1921] 2 K.B. 321, where there does not seem to have been any fiduciary relationship, although the C.A. seem to have thought the plaintiffs were entitled to follow at law in any event.

[55] [1914] A.C., at p. 421.

Similarly, in its judgment in *Re Diplock*, the Court of Appeal found that the fiduciary relationship existed in *Sinclair* v. *Brougham* " by reason of the fact that the purposes for which the depositors had handed their money to the directors were by law incapable of fulfilment." [56] If this is all that is required to establish a fiduciary relationship for the present purpose it is submitted that it is established whenever an adult delivers property to an infant under a void contract. Thus, if an adult lends money to an infant, the contract is void, no debt is created, and therefore the infant holds the money on resulting trust for the lender, in the view of Lord Haldane; or alternatively, the purposes for which the money was handed over, *viz.*, the creation of a valid contract of loan, is incapable by law of fulfilment, and that, in the view of the Court of Appeal, is enough to give rise to a fiduciary relationship. It is true that in *Leslie* v. *Sheill* Lord Sumner thought, *obiter*, that there was no fiduciary relationship, but *Sinclair* v. *Brougham* was then so recent that a thorough examination of the problem was hardly possible.

So far as goods are concerned, the question is a little more difficult owing to the unresolved problem, to which we have referred several times already, of whether the property in non-necessary goods passes to the infant. If the property does not pass, there is no difficulty at all, it is submitted, in holding that there is a direct equitable claim *in rem* for its recovery, and it may well be that the same remedy is available even if the legal title does pass. On this basis it is possible to justify the decision in *Stocks* v. *Wilson*,[57] where the infant obtained non-necessary goods by fraud and proceeded to sell them, and he was held liable to account to the seller for the proceeds. It is true that Lord Sumner criticised the case severely in *Leslie* v. *Sheill*, but most of his strictures were directed to the fact that the judge in *Stocks* v. *Wilson* gave a personal judgment against the infant, and that was obviously unjustifiable in a claim *in rem*. But, subject to this qualification, it is submitted that the case was rightly decided, and it is clearly distinguishable from *Leslie* v. *Sheill* for the simple reason that in that case, as Lord Sumner himself emphasised, the money had been spent.

Conclusions

The following summary of our conclusions may now be offered:

(1) An infant cannot enforce a contract where he has been guilty of fraud. For this purpose unconscionable conduct is fraud in the eye of equity, but mere non-disclosure of infancy is not.

(2) An infant who has a cause of action, independent of contract, for the recovery of property, *e.g.*, for securities deposited

[56] [1948] Ch., at pp. 540–541.
[57] [1913] 2 K.B. 235.

in respect of a void loan, may recover his property despite equitable fraud, but probably not where he has been guilty of legal fraud.

(3) An action against an infant for fraud lies if there is legal fraud, and if it is independent of contract, but not otherwise.

(4) An action to recover money in quasi-contract lies when the action would not be tantamount to enforcing a void contract.

(5) An action for the recovery of money lent to an infant lies, irrespective of fraud, wherever no debtor-creditor relationship is established, provided the money can be identified, in law or in equity.

(6) An action for the recovery of goods or money also lies, irrespective of fraud, (i) where the legal title has not passed, and (ii) where the legal title has passed but a fiduciary relationship exists, and provided in both cases that the goods or money can still be identified.

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DOCUMENTS IN THE LAW OF FORGERY

In *R.* v. *Collins*,[1] a case heard by five judges of the Court of Criminal Appeal, the appellants were the secretary and the treasurer of a football supporters' club. Unpaid agents of the club collected subscriptions locally and handed them to appellants, who falsely represented in the books of the club the amounts that they received and paid out. A charge of fraudulent conversion failed, and one of false accounting was mishandled. The court considered, however, that the making of the false entries amounted to forgery, of which the appellants were convicted.

Since this decision—delivered in a typically laconic judgment by Lord Goddard C.J.—it has seemed hard to draw a line between forgery, obtaining by false pretences, and false accounting. The orthodox once distinguished forgery from other types of fraud by claiming that a forgery tells not merely a lie, but "a lie about itself." This has been shown [2] to set limits on or to stem from what may be called a "document" (the term now employed in the Forgery Act, 1913, s. 1).

It is submitted that such orthodoxy is still defensible, and that *Collins* affects neither the definition of the term "document" nor, in consequence, the rule that a document must tell a lie about itself.

This phrase is, of course, metaphorical; as when a signpost is said to point to Babylon. The convention of a signpost is used to indicate distance and direction to a traveller. So also, signs on paper are used for a variety of purposes, depending on their arrangement and on the circumstances in which they are employed. A related group of usages has come to be known as documentary for the purpose of the law of forgery, and their abuse is said to make a document "tell a lie about itself."

Such a document need contain no other material element of falsehood. An example would be the forgery of a birth certificate. All the facts set out in it may be true, yet it will be no certificate, for lack of compliance with the formalities required by law. (The forgery does, in fact, represent that the proper forms have been observed, but this is of secondary importance.) The law looks to the purpose and consequences of such acts, and here will deny legal effect to them. Hence the document purports to be that which it is not.

[1] *R.* v. *Collins*, *R.* v. *Hopkins* (1957) 41 Cr.App.R. 231.

[2] Dr. G. L. Williams (1948) 11 M.L.R. 150—no longer cited in Kenny. Some recent decisions are discussed in an article by Mr. M. D. L. Worsley [1959] Crim.L.R. 101.

On the other hand, the facts of birth and parentage in the certificate may all be true and cannot be denied solely because the document is improperly created.

It is questionable whether this leading distinction is any longer necessary for the prevention of fraud, but it represents the logic and the history of the law, and can be reconciled with Lord Goddard's dicta in *Collins*.

Because, however, the distinction is one of degree or materiality, and of convenience, borderline situations do occur. If such cases can support any argument, then it is thought that they bear out the present one.

The two most controversial decisions are, of course, *Closs* [3] and *Smith*.[4] C. copied a painting by J.L., imitating his signature in one corner; held, no forgery. In *Smith*, S. fraudulently prepared wrappers similar to those used by the prosecutor. He also was acquitted of forgery. These cases have given enjoyable opportunities for argument by analogy and *ad absurdum*, but a comparison with the recent case of *Pryse-Hughes* [5] shows their intelligible principle.

Pryse-Hughes was convicted of forgery at the Central Criminal Court. He pleaded not guilty to the uttering of a forged document purporting to come from an art expert and ascribing a painting to John Constable. He had previously removed the actual painter's name, and produced the bogus certificate when a client remained unconvinced that the painting was a Constable. This shows, it is submitted, that forgery is properly limited to those cases in which the use of language by the accused purports to be some performatory [6] use of language by another person.[7] That is only a more general way of stating the conclusion reached by Dr. G. L. Williams.

For example, if I write "Pass" on an examination script that I have just marked, or put my name on a cheque, another person can say (or forge) what I have done. But my words do not simply "stand for" or "communicate" a set of facts. They are words of appraisal, or of voluntary obligation. To write "J. Linnell" on a worthless painting is, on the authority of *Closs*, a mere factual assertion. This is certainly a possible way of looking at the case, which is evidently not on all fours with *Pryse-Hughes*. There, the important point was who said what; in *Closs*, what was said. One might still perhaps feel dissatisfied with *Closs*, but only over where the line has been drawn; the

[3] (1858) D. & B. 460.
[4] (1858) D. & B. 566.
[5] *The Times*, May 14, 1958. No reasons are reported, but the facts and charge are given.
[6] It will be argued in other words that a work of art is a self-contained or useless performance. A ballot paper in a beauty contest, but not the Venus de Milo, could be forged
[7] Where he exists; the fictitious person cases go on the same lines.

principles were correctly chosen. Forgery is a violation of the unique and not a mere misrepresentation of fact. Some man is to signify his approval, censure, permission, decision. The forger simulates the language of that man; and so we are deceived as to the function of that language (metaphorically, the document tells a lie about itself). This makes it clearer to see why Ford cars, painted front doors and similar objects are not "documents" (which has always been felt reasonable—nobody, of course, would expect spoken words to constitute a document). In *Smith* the wrappers were used for the linguistic purpose of the signature in *Closs*, so acquittal was again proper. Dr. Williams has called the reasoning of that case "indifferent," but concedes that the decision must be authority for something. He considers that *Smith* requires the "document" to be within the ambit of the undefined term "instrument" in section 7 of the Forgery Act, 1913. This makes *Smith* a turning point in the law (a matter, admittedly, of no historical importance), which is unnecessary on the view suggested in this note.

Support for *Closs* can also be gathered from the refusal by the courts to hold that the imitation of a work of art is forgery. This again is a matter of convenience and common usage, once the practical value of the existing distinction between categories of fraud is granted. It is of little importance to a purchaser that the forger is incidentally claiming that his own vision and estimation of the greenness of trees or the fleshiness of flesh is that of the artist. The reaction of the prosecutor is not that the artist did not make the innumerable artistic decisions in question, but that he did not paint the picture. A comparison can be made with the classification of types of evidence. X says that he heard Y shout "Stop thief!" If Y is not available, then his shout is inadmissible, since hearsay, to prove that Z is a thief. It is admissible only in cases where it might be necessary to show that Y was in a particular place, as would "Hi!" or any loud cry, or to show what Y thought of Z. The courts seem to have made an analogous distinction for the purposes of the law of forgery between statements of fact and statements valuable for themselves. The imitation of a painting has then been placed in the former class, since the courts do not accept that the painter's decisions in it are primarily what have been falsified; or rather they hold that nothing turns upon style *per se*, its only relevance being to support a factual assertion that a painting is by a particular artist. This is fair enough where the Old Bailey and not the Tate is concerned. Nor is it easy to see how the requirement of an intent to defraud could be clearly established on any other approach.

It is thought that this explanation still holds after *Collins*. In *Collins* it was argued unsuccessfully by the defence that a

person could not be guilty of forgery where he had falsified accounts, but must be charged under the Falsification of Accounts Act, 1875. Because the criminal law grew haphazardly,[8] the nineteenth-century lawyers were hampered in their attempts to apply general principles, and legislation like the 1875 Act left them disputing from which branch their prisoner should be hanged, while the experienced or lucky traveller avoided the wood altogether. In *Re Arton (No. 2)*[9] the court was of the opinion that not all falsification of accounts was forgery, although some was. The type of case where it is perhaps artificial to consider falsification of accounts as identical with forgery is illustrated by *Re Windsor*,[10] which is sufficiently unlike *Collins* for Lord Goddard's refusal to discuss it there to be understandable. In *Re Windsor* a clerk fraudulently entered sums in a book, which he had to compile each day, as assets of the bank which employed him. It was held that he had not committed forgery, Cockburn C.J. pointing out: "This is a statement to the bank, not a statement put forward by the bank." Again, as in the problem of the painting, the result is one of convenience. In a faint, far-off way the writing in *Windsor* did purport to be that which it was not, for no doubt it represented the last stage in the (distorted) declarations of legal relationship between the bank and its clients. But (if, say, a forged cheque be taken as a clear case of a document which tells a lie about itself) it seems legitimate for the C.C.A. to hold that the accounting in *Collins* is closer to a typical forgery than to the fraud in *Windsor*. Applying the words of Dr. G. L. Williams, there was in the former case a falsification of "writings containing or evidencing a bilateral transaction or unilateral act in the law" (for all practical purposes such evidence is intended to replace the act itself). And the merits of *Collins* must have encouraged the court to draw the line where it did. In *Collins*, Lord Goddard emphasised that he was "only concerned with the Forgery Act, 1913, as amended by the Criminal Justice Act, 1925, because forgery is a statutory offence." His impatience with the law before 1913 repeats the tone of the parliamentary debates on the Forgery (No. 2) Bill. Indeed, the Act was an attempt to codify, with the minimum amendment necessary, existing law. The original plan, to "produce photographically the law of forgery as it is" was seen to entail a "photograph of confusion." The chief respect, apart from the standardising of sentences, in which the law was simplified was by pulling together the descriptions of documents from various statutes. This shows that "document" had a technical meaning in 1913, which was repeated in the Act. Lord Goddard, in the spirit of the makers of the Act, who thought in terms of a future criminal code, stated in

[8] Kenny, 17th ed., *passim*; and para. 323.
[9] [1896] 1 Q.B. 509.
[10] (1865) 6 B. & S. 522.

Collins that the courts should follow the wording of the 1913 Act, disregarding the complicated provisions of the previous century, since the Act embodies a clear expression of the result of that law. The final position is similar to that reached by a different path in larceny cases. Larceny, Lord Goddard insisted, was a common law offence, but he tended to look at the 1916 Act as an approved solution of his problems, based on nineteenth century cases.[11]

It is therefore submitted that a document must still tell a lie about itself, and cannot be forged unless this is possible. If the definition in Kenny (where the 1913 Act is also paramount) is adopted, that a document is "writing in any form, on any material, which communicates to some person or persons a human statement, whether of fact or fiction,"[12] then the cases on falsification are made unnecessarily difficult and no clear doctrine is provided for the interpretation of the Forgery Act.[13]

D. J. Bentley.*

[11] *R.* v. *Bryant* [1956] 1 All E.R. 340; *Russell* v. *Smith* [1957] 2 All E.R. 796.
[12] Kenny (*op. cit.*), para. 380.
[13] I should like to thank Mr. J. E. Hall Williams for advice and criticism.
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STATUTES

The Local Government Act, 1958

The reform of local government is not a popular pastime of politicians. Those who benefit from it complain about the delay and are ungrateful. Those who suffer are the more incensed. Local authorities must be regarded by Whitehall as institutions created to administer departmental policies and if this administration is reasonably efficient, why interfere? Nevertheless, anomalies mount up; so do rates; many M.P.s are ex-councillors; the associations of local authorities are vigorous and influential; and now and again, Governments, for one reason or another, have to produce some reforms. This important Act is the most recent attempt on a fairly large scale.

The Government began by issuing three White Papers in 1956 and 1957. These dealt with Areas and Status,[1] Functions of County and County District Councils,[2] and Finance.[3] Much discussion followed, especially on the last. The Opposition said it was a device to discourage expenditure, especially on education (and the White Paper *had* said that the existing grant system acted "as an indiscriminating incentive to further expenditure"—which might seem to carry certain undertones) and the Government said, on the contrary, that it was to give greater freedom to local authorities and didn't the Opposition trust the locally elected representatives of the people?

The Act follows, in its substantive Parts, the pattern of the three White Papers. Part I concerns grants and rates, Part II concerns the review of local government areas, and Part III concerns the delegation of functions to councils and county districts.

The principal purpose of this Third Part is to enable schemes to be made delegating health and welfare functions from county to county district councils. For most of these functions, a delegation scheme may be made by the council of a borough or urban district having a population of 60,000 and, with the consent of the Minister of Health, by the council of any other county district. The Minister's consent will be given only where there are special circumstances. The scheme is transmitted to the county council and submitted by that council to the Minister for his approval. The other purpose of this Part is to enable non-county boroughs

1 Cmd. 9831.
2 Cmnd. 161.
3 Cmnd. 209.

and urban districts to claim the status of excepted districts for the purposes of the Education Act, 1944. The right of such authorities (having, in the usual case, a population of 60,000) to claim had been given for a limited period, long expired, under that Act. This provision revives it from time to time. This Part of the Act of 1958 does not apply, save under Order in Council, to Greater London.

The Second Part establishes two Local Government Commissions, one for England (excluding Greater London) and one for Wales. The conurbations of Tyneside, West Yorkshire, South-East Lancashire, Merseyside, and West Midlands are designated as special review areas. Outside these areas, each Commission reviews counties and county boroughs and may make proposals to the Minister for the alteration, abolition, new constitution and conversion of their areas and status. New counties or county boroughs can be proposed. Existing counties and county boroughs abolished. And so on. In the special review areas, each Commission may, in addition, make proposals for the reorganisation of county district councils. The procedure prescribed for the Commissions is elaborate, requiring consultations with local authorities, giving opportunities for objections and representations, and providing for the holding of local inquiries. The Minister is also given certain over-riding and initiating powers where he disagrees with the proposals. The Minister gives ultimate effect to the proposals by orders which are subject to parliamentary resolution. For the county district councils outside the special review areas, the county councils are responsible. After the review by the Commission, the county council conducts its own review of the county districts. Finally, there are a number of general provisions. Section 34 provides that the Minister shall presume that a population of 100,000 is sufficient to support the discharge of the functions of a county borough council—without suggesting that every urban authority of this size will necessarily be given that status. Section 35 forbids for fifteen years the promotion of local authority Bills designed to change areas or status. Section 36 enables the Minister to make regulations for the guidance of the Commissions—and he has made S.I. 1958 No. 2115.

The First Part of the Act has been the battleground though, of its sixteen sections, only the first three have been greatly controversial. Section 9 provides for the partial re-rating of industrial and freight-transport hereditaments which are now to pay 50 per cent. of their liability instead of 25 per cent. Sections 10–13 provide for the rating of gas and electricity authorities which are to be treated more as ordinary concerns. Section 4 discontinues certain small grants. Sections 5–7 change the rating equalisation system. Under the Local Government Act, 1948, Exchequer Equalisation Grants were paid to those counties and county boroughs whose

rateable value per head of weighted population was less than the national average. Now these grants are discontinued and in their place rate-deficiency grants are to be paid to those county councils, county borough councils and county district councils which qualify. This grant is payable to an authority the penny rate product of which is less than its standard penny rate product. This standard penny rate product is the sum which bears to the penny rate product of England and Wales the same proportion as the population of the authority bears to the population of England and Wales. Assume that the penny rate product for an authority is £25,000 and that its standard penny rate product is £26,000. Then the grant payable is the amount which bears to the expenditure of the authority the same proportion as the difference between these rate products bears to the standard penny rate product, *i.e.*, $\frac{1,000}{26,000}$ × expenditure. But the Act proceeds, in section 6, to limit this expenditure (for the purpose of calculation only) to what it calls "normal expenditure." The basis of comparison is the average per head expenditure in the three preceding years of other local authorities of the same group (*e.g.*, county councils or rural district councils) and the average per head expenditure for the same period of the particular authority concerned. The "normal expenditure" of that authority is limited to the amount which bears to its preceding three-year expenditure the same proportion as the expenditure of the group bears to the group's preceding three-year expenditure. Actual expenditure above "normal" is disregarded for the calculation of the grant.

Finally, sections 1–3 institute the controversial general grants. The purpose is to pay a single annual sum to each county and county borough council in place of the grants payable for eleven separate functions. These functions are education; services under the National Health Service Act, 1946; fire services; services under section 39 (1) of the Children Act, 1948; most town and country planning functions; road safety functions; the provision and maintenance of vehicles and equipment for use by police forces in connection with the law relating to road traffic; registration of electors; physical training and recreation; provision of accommodation under the National Assistance Act, 1948; and school crossing patrols. Most of the grants hitherto payable for these functions were percentage grants, that is, the Government paid a fixed percentage of the approved expenditure. Education is overwhelmingly the most important item in the list, accounting for perhaps 85 per cent. of the whole. The items of considerable expenditure by local authorities which are not in this list are police, highways and housing. These three, with others of less importance, will continue to attract grants on the old basis.

Section 1 goes on to provide that the Minister shall prescribe the aggregate amount of the general grants and Schedule 1 provides

the principles on which the aggregate is to be distributed amongst the recipient local authorities. General grant orders (prescribing the aggregate and giving the details of the arithmetic of its distribution) must be approved by Commons resolution; they cover periods of at least two years and the first order to be made [4] is for 1959–60 and 1960–61. Section 2 of the Act requires the Minister, in fixing the annual aggregate, to take into account (a) relevant expenditure, and the current level of prices, costs and remuneration, (b) any probable general fluctuation in the demand for services, (c) the need for developing services and the extent to which, having regard to general economic conditions, it is reasonable to develop these services. The Minister may make amending orders if there is an unforeseen increase in prices, costs or remuneration and he thinks that its effect ought not to fall entirely on local authorities. Section 3 empowers the Minister to reduce the grant to an authority if he is satisfied that it has failed to achieve or maintain reasonable standards and he may make regulations prescribing these standards.[5]

Each authority receives, as its share of the aggregate grant, a basic grant based on population and the number of children under fifteen years of age. There are also seven supplementary grants. Every authority receives something on the basis of the first two supplementaries which relate to the number of persons under five years of age and over sixty-five years of age. Four other supplementaries are payable only if an authority qualifies for one or more of them. They are based on a high ratio of school children to population, high density population, low density population, and high percentage decline of population. The last supplementary is payable to authorities in the metropolitan area.

Last summer, the Government asked counties and county boroughs to estimate their expenditure for 1959–60 and 1960–61 for the services affected. On the basis of those figures, and after consultation with local authority associations, the general grant order was made which fixed the aggregate amount for 1959–60 at £393m. and for 1960–61 at £414m. The percentage and other grants replaced will, it is estimated, total £363m. in 1958–59. The Government was therefore able to turn fairly easily the arrows of the Opposition aimed in the accusation that the Government's purpose was to hamper the development of the social services. Nevertheless the financial changes brought about by this legislation may prove to be considerable and even salutary. There can be no doubt that the working of local government has been clouded and concealed by the percentage grant system—not least from councillors themselves. A proposal to embark on considerable expenditure was more happily and less responsibly accepted when the authority knew that, provided the expenditure was approved by the Minister, the local

[4] S.I. 1958, No. 2083; see also H.C. 15 and 15–I of 1958–59.
[5] See, *e.g.*, S.I. 1959, Nos. 364, 365, 366, 393, 394, 395, 396.

ratepayers would have to pay only half the cost. The new system may bring out into the open the only real question remaining, that is, "how much and how quickly?" The refusal of so many members of local authorities to connect the level of rates with the quality of the services provided must somehow be overcome. Only when the issues are clear will the real decisions be taken. For example, I happen to believe that the amount of money being spent by local education authorities is grossly inadequate and that an immediate rate increase of something like four shillings in the pound is presently necessary. Others believe that the expenditure is even now excessive.

The Government has made much of the greater freedom which the new system will give to local authorities. To some extent, this will be illusory unless the Ministers are really prepared to remove many administrative and some statutory controls. The building of every new school must, by statute, receive specific departmental approval and this control is most rigorously applied. Similarly, approval must be obtained for the raising of loans. By such methods, the Government decides how much capital investment in education, highways and all major services is to be allowed. So also, local authorities have no discretion in the salaries of most of its employees, including school teachers and the police. It is idle to hope that the Government will give up its powers in these fields and, indeed, it is clearly a governmental responsibility to determine the broad pattern of expenditure. Nevertheless the new system could lead to more policy decisions of more importance at the local level. In real terms, like or dislike of the change depends on the political views of the beholder and the political actions of the local authorities. One who believes in the desirability of greater spending on the social services will be pleased if the freedom is used to spend more and displeased if it is used to spend less. One who believes in greater economy will have the converse reactions.

Finally, there is a danger that the provision of new or much enlarged services will be hampered. Once authorities have made policy decisions on the general level of their expenditure against the background of the general grant which they know they will receive, it will be difficult for them to embark on additional expenditure. For the addition will have to be financed either by an increased rate to cover the *whole* of its cost or by changing the earlier decisions and reducing expenditure on other services. In this sense, the new system could result in less flexibility than the old. And the services which suffer most might be those where the expenditure is already relatively small but nevertheless of immense importance: I mean services for children in need of care and protection, health services under the National Health Service Act, 1946, and town and country planning.

J. A. G. Griffith.

The Costs of Leases Act, 1958

On the grant of a lease, the practice in England is for the landlord's solicitor to draw the draft lease and to agree its terms with the tenant's solicitor. Then the landlord's solicitor prepares both the lease and the counterpart lease for execution by the landlord and tenant respectively. The tenant must of course pay the costs of his own solicitor and the stamp duty on the lease. The person primarily liable to pay the costs of the landlord's solicitor is the landlord himself. Until July 23, 1958, when the Costs of Leases Act received the royal assent, it was, however, the custom in most parts of the country that the tenant should pay the landlord's solicitor's costs, and also the five-shilling stamp duty on the counterpart.[1] The custom was of long standing: certainly it was over a hundred years' old.[2]

Although the custom was naturally well known to the legal profession, it was probably not so well known to the general public.[3] Many solicitors have no doubt experienced the surprise of a prospective tenant when told that he has to pay the bill, not merely of his own solicitor, but of the landlord's solicitor too—a surprise not diminished by the fact that the landlord's solicitor, having done the work of drawing and engrossing the documents, usually charges twice the amount of the tenant's solicitor.[4]

Particular hardship was caused to the tenant when the lease was a long lease granted at a substantial premium comparable to the price which would be asked on the sale of the property. On a sale (*i.e.*, a conveyance of the fee simple or the assignment of an existing lease) each party bears his own costs. Yet if the transaction was carried out by the grant of a lease, even though at a nominal rent only, in most districts the custom applied unless expressly excluded by agreement; and this despite the facts that solicitors, estate agents and laymen commonly refer to such a transaction as a sale, and that the costs are not less than (and frequently exceed) those payable on a sale at the same price.

From the point of view of the landlord's solicitor the custom was a popular one: he never had the unpleasant task of submitting a bill to his own client, so that good solicitor and client relations were not marred by financial considerations. The Law Society is therefore to be congratulated on its view that the custom should be abrogated, expressed in a memorandum to the Lord Chancellor in September, 1956,[5] and in its support of the Bill introduced by a

[1] *The Law Society's Digest* (1954), Vol. 1, Opinion of the Council No. 274. In the districts of 91 local Law Societies, the general custom applied; only in 17 districts did the local custom diverge materially from the general custom.

[2] Such a custom was proved as a fact in *Grissell* v. *Robinson* (1836) 3 Bing. N.C. 10.

[3] See the remarks of the Lord Chancellor (Lord Kilmuir) as to the desirability of the general knowledge of a custom: 210 H.L.Deb. 672 (July 7, 1958).

[4] Solicitors' Remuneration Orders, 1882 to 1953, Sched. I, Part 2.

[5] Annual Report of the Council of the Law Society, 1956–57, p. 82.

private member (a solicitor) with the Government's blessing. Professional self-interest is not perhaps entirely absent, for a client's irritation at the amount of a solicitor's bill of costs is no doubt greater when it is not even the bill of his own solicitor.

The meat of the Act is in section 1, which is terse enough to be set out in full:

> " Notwithstanding any custom to the contrary, a party to a lease shall, unless the parties thereto agree otherwise in writing, be under no obligation to pay the whole or any part of any other party's solicitor's costs of the lease." [6]

How far landlords are likely to exercise their right to insist, by express provision in the agreement or lease, on the tenant's payment of their costs, is for the moment a matter of conjecture. Different views were expressed in the Lords' debate by Lord Milner of Leeds and Lord Silkin, both solicitors of considerable experience.[7] Probably future practice will depend on the state of the market. As long as premises to let are in short supply, many landlords will probably take advantage of their superior bargaining position to impose " take it or leave it " terms on their tenants. But the great advantage of the new position is that it will no longer be such a disguised premium.

Aubrey L. Diamond.

[6] " Costs " includes, *inter alia*, stamp duty: s. 2 (*b*).
[7] Lord Silkin wished to prohibit " contracting out."

REPORTS OF COMMITTEES

Company Law Reform in Ireland

The recent appearance of two reports of Departmental Committees, one emanating from Northern Ireland [1] and the other from the Republic of Ireland,[2] indicates that the revision of legislative provisions governing companies is receiving attention in both of these jurisdictions. An examination of the statutory position in each case, indeed, reveals that reform is somewhat overdue. The existing law in Northern Ireland is contained in the Companies Act (N.I.), 1932 (a local adaptation of the Companies Act, 1929), while the Republic of Ireland still relies on the Companies (Consolidation) Act, 1908.

Comparison with the legal position in Great Britain is rendered difficult by the existence in Ireland of certain localised economic conditions which involve, in turn, special policy considerations. Since Northern Ireland is an integral part of the United Kingdom, it is natural that any projected reform in the law there should be framed with the object of preserving a high degree of uniformity with that of Great Britain. In addition, the amount of capital invested in companies registered in Northern Ireland is less than half that invested in Great Britain, with the result that the desire to attract British capital is an added deterrent against any departure from the British system.

Another factor conditioning any change in the law in Northern Ireland arises from the circumstance that a very large proportion of the available local capital is invested in private companies. Here, considerations of uniformity must be subordinated to local needs, and the conditions of investment in local companies must be made sufficiently attractive to stimulate the local investor. In the past, says the Northern Ireland report, the public has become aware of the pitfalls that exist for the minority shareholder in private companies, and it recommends that any reforms must be carried out with a view to enabling "investors to take a minority interest in a private company with a full assurance that the law would see that they received justice at the hands of their fellow members."

Despite the radically different constitutional relationship of the Republic of Ireland to the United Kingdom, similar policy considerations seem to prevail. The report on that jurisdiction admitted that company legislation should not depart "too far in its general principles from company legislation in Great Britain and in

[1] Report of Departmental Committee on Company Law Amendment. [1959. Cmd. 393.] H.M.S.O., Belfast.

[2] Report of the Company Law Reform Committee, 1958. [1958. Pr. 4523.] Stationery Office, Dublin.

Northern Ireland," in view of the fact that the encouragement of outside investors forms part of the avowed policy of the State. As in Northern Ireland, the number of public companies registered in the Republic is small,[3] and so there also the private company occupies a dominant position. The committee in the Republic was inclined towards the view that legislation respecting private companies should not " merely in order to block possible but rare abuses " impose unnecessary restrictions or heavy expenses on the operation of such companies, and it believed that the system should be left as flexible as possible.

The recommendations of both committees fall under two heads: First, certain fairly radical alterations of the law, involving amendments in principle. Secondly, a large number of minor changes, designed to bring the law in each jurisdiction into line with modern practice elsewhere. In a brief survey it is not possible to do more than to indicate the attitude of the committees towards certain questions falling within the first category.

The ultra vires rule

The Northern Ireland committee was prepared to accept the solution provided by the Companies Act, 1948, and did not comment further upon the doctrine. In the Republic, the question was given fuller consideration. After stating that the purpose of the doctrine had been " largely defeated," and that " there is much in favour of the view that the doctrine should now be wholly abolished," the committee reached the rather inconsequential conclusion that such a change ought not to be made, apparently on the ground that since a similar recommendation made by the Cohen Committee [4] had not been accepted in Great Britain, so it must be assumed that there were " strong reasons " for such a decision. It was therefore concluded that the correct solution was that propounded in the 1948 Act.

Share capital

Perhaps the most interesting recommendation in the two reports is that contained in the report from the Republic, advocating the introduction of shares of no par value. After indicating that the attribution of a nominal value to an ordinary share is misleading, and marshalling the other arguments in favour of the change, the committee recommended that legislation should be passed to enable such issues to be made, but that it should not extend to shares which have a fixed dividend element or a fixed element of repayment of capital, or to shares which confer a right to both a fixed dividend and a participation in profits. Companies should be permitted to convert their ordinary shares having a nominal value into no par

[3] In 1956 the figures were: Public companies, 372; Private companies, 7,385.
[4] 1945, Cmd. 6659, paras. 11, 12.

value shares, and vice versa; but no company should be permitted to have ordinary shares of both types at the same time.

It is interesting to compare this view with that expressed by the Cohen Committee,[5] to the effect that such a change might lead to over-elaboration of accounting and to possible fraud. Reference was made to the report of the Gedge Committee,[6] in 1954, and it is possible that the Irish findings were framed with its conclusions in view.

Subsidiaries

The Northern Ireland committee, while feeling that all private companies should continue to be exempt from the obligation of filing balance sheets with the annual returns, considered that the published accounts of holding companies should disclose any information regarding associated private companies " which the shareholders or the public are legitimately entitled to receive." It recommended the adoption of section 154 of the 1948 Act, modified to cover the case in which the share capital in a private company is held in equal parts by two public companies, thus preventing it being a subsidiary of either for the purpose of disclosure by means of group accounts.

The committee in the Republic contented itself with recommending the adoption of section 154, though it " deplored its complexity." Both committees were opposed to the dichotomy of " exempt " and " non-exempt " private companies, principally on the grounds of the impossibility of constructing a workable definition of either class.

Directors

Both committees agreed that the law regarding loans to directors was in need of modification. In Northern Ireland it was thought that section 190 of the 1948 Act should be adopted in the case of public companies, leaving the existing law unchanged in the case of private companies. In the Republic, on the other hand, the committee felt that the practice of making such loans was so frequent that its prohibition should not be advocated, being of opinion that " elaborate provisions and safeguards which are easily evaded bring the law into disrepute." The only possible safeguard, it was thought, was full disclosure in the accounts.

The Northern Ireland committee wished to extend the provisions of section 183 of the 1948 Act to all companies, in connection with the election of directors, while the Republic would be content with its adoption without such extension. In addition, both committees concurred in the view that there should be a statutory limitation on the very wide indemnity possible for directors under the law as it existed in Great Britain prior to 1948.

[5] *Ibid.*, paras. 17, 18.
[6] 1954, Cmd. 9112. In particular, *cf.* paras. 21–28.

The Northern Ireland committee made the interesting suggestion that section 178 of the 1948 Act, if adopted, should be modified in such a way as to preclude a company having a corporation as a director. Starting with the assumption that "a limited company has neither intelligence, discretion, a capacity to be punished nor a conscience," the committee was strongly of the opinion that the responsibility of directors for wrongful acts contemplated by the Companies Acts is the responsibility of natural persons, and that it cannot be discharged by the appointment of another body corporate as such director. The committee cited with approval a similar view expressed in the Final Report of the Company Law Amendment Enquiry Commission, 1947–1948, of the Union of South Africa,[7] a document which it states it found "most valuable."

Voting rights

Here there was accord between the committees that changes are necessary. In Northern Ireland it was suggested that the right to appoint a proxy, in the case of a private company, should be confined to appointing another member or a solicitor or a person qualified to act as auditor. In the Republic, on the other hand, it was felt that a company should not be allowed to impose restrictions on the persons who may be appointed proxies, and no reference was made to the undesirability of consequential disclosures to a stranger.

Investigations

The Northern Ireland committee gave detailed consideration to the scope of sections 172, 173 and 174 of the 1948 Act, with respect to the appointment of Board of Trade inspectors. It regarded these provisions "as oppressive and out of tune with our own conception of the liberty of the individual," and was emphatically opposed to their introduction into that jurisdiction. Dealing with the arguments put forward by the Cohen Committee [8] in favour of the disclosure of the beneficial ownership of shares, it felt that they were unconvincing; in any event, nothing should be done which might impede the flow of outside capital into the Province.

Oppression of minorities

This important matter received comprehensive consideration by both committees. In the Republic the existence of the problem was recognised and, indeed, it seems to have a real significance.[9] There, the committee was content to recommend the adoption of section 210 of the 1948 Act, without more.

[7] The "Millin Report."
[8] 1945, Cmd. 6659, para. 79.
[9] *Cf. Nash* v. *Lancegaye Safety Glass (Ireland), Ltd.* (1956) 92 Ir.L.T.R. 11: a particularly good example of oppression.

In Northern Ireland, the matter was given closer examination. Taking the view that section 210 had proved to be ineffective, and that the cases which had been decided under it were of such a type that a winding-up order would have been made in any event,[10] the committee thought that the principal defects emanated from the fact that (1) a petitioner in order to succeed under section 210 must, in reality, show that the facts would justify a winding-up, and (2) an order to wind up on the ground that it is "just and equitable" placed too heavy an onus on the petitioner, an onus of showing a lack of probity akin to fraud. Shareholders, it was said, are entitled to relief long before any such point is reached.

The Northern Ireland committee recommended that the following draft section be enacted as the equivalent of section 210:

> "(1) Any member of a company who complains that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to him or some part of the members (including himself) or in disregard of his or their proper interests as members of the company, may make an application to the court for an order under this section.
>
> (2) If on such application the court is of opinion that the company's affairs are being conducted or the powers of the directors are being exercised as aforesaid, the court may, with a view to bringing to an end the matters complained of, make such order as it thinks fit, whether directing or prohibiting any act or cancelling or varying any transaction, or for regulating the conduct of the company's affairs in future, or for the purchase of the shares of any members of the company by other members of the company or by the company (and in the case of purchase by the company, for the reduction accordingly of the company's capital), or otherwise.
>
> (3) If the court is satisfied that the matters complained of cannot be brought to an end under the provisions of subsection (2), the company may be wound up by the court."

This provision is probably an improvement on the equivalent section in the 1948 Act. Moreover, in the case of private companies, the Northern Ireland committee was prepared to extend its protection to include the personal representatives of a deceased member. Finally, it thought that possible adverse publicity with respect to private companies might be controlled by the making of suitable rules of court, providing for the hearing of such applications in chambers.

V. T. H. Delany.

[10] *e.g.*, *Scottish Co-operative Wholesale Society, Ltd.* v. *Meyer* [1958] 3 W.L.R. 404.

NOTES OF CASES

Novation of Debts and the Conflict of Laws

In *Re United Railways of the Havana and Regla Warehouses, Ltd.*[1] the Court of Appeal (Jenkins, Romer and Willmer L.JJ.) affirmed the judgment of Wynn-Parry J.,[2] a note on which will be found in the March 1958 issue of the *Modern Law Review*.[3] It is unnecessary to repeat the complicated facts of this case, of which a summary was given in the previous Note. On most points the court was unanimous, but Willmer L.J., dissenting in this matter from the majority, thought that the law of Cuba was the proper law of the contract, and also took a different view on the quantification of the claim for which the trustee could prove in the liquidation of the company. Despite the unanimity of the court on most of the essential points in issue, leave to appeal to the House of Lords was granted in view of the exceptional legal importance of this case, and it is understood that the appeal is now pending. Whatever its outcome, the decision of the Court of Appeal is an outstanding contribution to English private international law and merits the closest attention of those interested in this subject. An attempt will be made here to draw the reader's attention to what are submitted to be some of the most significant features of the case.

(1) The principal question was whether the indebtedness of the English company to the Pennsylvania trustees had been discharged by compulsory statutory novation under the law of Cuba. The court found as a fact—unanimously—that there had been no novation under the law of Cuba, the Cuban Government merely having undertaken an obligation to the company to discharge its liabilities. Hence, even if the discharge of the company's obligation towards the trustee was governed by Cuban law *qua lex situs* or if (alternatively) Cuban law was, as Willmer L.J. thought, the proper law of the contract between the company and the trustee, there was no novation of the debt. The decision of the court can, of course (apart from the question of the amount of the debt), be said to rest on this finding of fact, but it is sincerely hoped that the "precedent purists" will not, on this ground, dismiss as *obiter dicta* the important legal analysis and clarification contained in the joint judgment of Jenkins and Romer L.JJ.

(2) To arrive at an answer to the question as to what law governs the substitution of a new for an old debtor under a contract, the

[1] [1959] 2 W.L.R. 251; [1959] 1 All E.R. 214. [2] [1958] Ch. 724.
[3] 21 M.L.R. 174.

court had to characterise this issue so as to fit it into the framework of the English conflicts rules, and it did so by means of a jurisprudential analysis. Wolff [4] was quoted to the effect that this substitution may be (as in Roman, English and French law) thought of as an extinction of an old debt coupled with the creation of a new one, or (as *e.g.*, in German law) as an act of succession without change in the identity of the debt: in either case there is a notional "dichotomy" of the act of substitution into an act of discharge and an act of entry of a new debtor (the latter, as the court thought, being governed by the law most closely connected with this act of "entry," *i.e.*, normally the law of the country in which the new debtor is domiciled or carries on business). The court was, however, concerned with the "first limb" of this act of substitution, *i.e.*, with the discharge of the old debtor. In view of this jurisprudential analysis the question could be narrowed down: what law governs the discharge of a debt by novation?

(3) The court accepted Dicey's Rule [5] that the discharge of a contract is governed by its proper law and not by the *lex situs* of the debt or other chose in action which arises from the contract. In this respect there is no difference between "a debt which has accrued due under a contract" and "a contractual obligation to make a payment *in futuro*." [6] The Court of Appeal has thus given its authority to the rejection of a distinction which had been based on the obsolete system of forms of action.[7] Moreover, as *Perry* v. *Equitable Life Assurance Society of the U.S.A.*[8] shows, the proper law of the contract governs the discharge, whether such discharge is alleged to be based on an act of the parties or on an act of State. It is gratifying that the difficulty which had been created by the Russian bank cases [9] has been removed by the Court of Appeal: that, *e.g.*, Maugham J. in *Re Russian Bank for Foreign Trade* [10] based his decision on the Russian *situs* of the debt can be explained from the fact that the relevance of the proper law was not argued before him and, moreover, as Jenkins and Romer L.JJ. said,[11] the Russian bank cases "were cases of so special a character as to

[4] *Private International Law*, 2nd ed. (1950), Para. 441, p. 458; see [1959] 2 W.L.R., at p. 266.

[5] *Conflict of Laws*, 7th ed. (1958), Rule 155, p. 804.

[6] [1959] 2 W.L.R., at p. 268.

[7] See 21 M.L.R. 176.

[8] (1929) 45 T.L.R. 468. On the same point: *R.* v. *International Trustee* [1937] A.C. 500; *Mount Albert B. C.* v. *Australasian, etc., Ltd.* [1938] A.C. 224, P.C.; *Re Helbert Wagg & Co., Ltd.'s Claim* [1956] Ch. 323; *National Bank of Greece and Athens* v. *Metliss* [1957] 3 W.L.R. 1056; *Adams* v. *National Bank of Greece and Athens* [1958] 2 Q.B. 59.

[9] *Re Russian Bank for Foreign Trade* [1933] Ch. 745; *Re Banque des Marchands de Moscou* (*No.* 1) [1952] 1 All E.R. 1269; *Re Banque des Marchands de Moscou* (*No.* 2) [1954] 1 W.L.R. 1108.

[10] [1933] Ch. 745.

[11] [1959] 2 W.L.R., at p. 271.

afford little guidance in the elucidation and application of private international law in general." [12]

(4) The court thus also accepted the distinction between cases in which the title to a debt is in question and those which concern the existence or the content of the obligation. The first type of case, *e.g.*, a case turning on the validity or effect of a transfer of a debt to a new creditor by operation of law,[13] is governed by the *lex situs* of the debt. The second type, *e.g.*, a case of discharge by novation or—a matter also important in the present case in view of the Cuban legislation—of a moratorium, is governed by the proper law of the contract. This is the most important point in the case. The court went very far in considering the *lex situs* as the law governing assignments, further than warranted by earlier cases such as *Lee* v. *Abdy* [14] and *Republica de Guatemala* v. *Nunez*.[15] But the crucial passage in the judgment of Jenkins and Romer L.JJ. may perhaps be regarded as contemplating only involuntary assignments.[16] This is what they said [17]:

> "There is no true analogy between the two cases (of compulsory assignment and compulsory novation). The contractual right to receive payment of a debt is an item of property, that is to say, a chose in action. It can be transferred by the creditor to a third party but the validity of the transfer necessarily depends upon the *lex situs*, because the courts of the country where the debt is have jurisdiction over the title to it. Novation, on the other hand, does not involve the transfer of any property at all, for . . . it comprises the annulment of one debt and the creation of another."

(5) Jenkins and Romer L.JJ. considered the law of Pennsylvania to be the proper law of the contract, the Philadelphia plan being essentially an American transaction, and Pennsylvania being the state with which the contract was most closely connected. Willmer L.J. emphasised that the trust agreement [18] and the Cuban lease were closely linked together and he concluded that Cuba was the country with which the contract has its closest and its most real connection. All the members of the court based their reasoning on the so-called "objective" formulation of the proper law

12 For the difficulties which the Court of Appeal has now removed see Dicey, *Conflict of Laws*, 7th ed. (1958), pp. 810–811, esp. note 38.

13 *New York Life Insurance Co.* v. *Public Trustee* [1924] 2 Ch. 101, C.A.; *Bank voor Handel* v. *Slatford* [1953] 1 Q.B. 248—see esp. p. 257 (*per* Devlin J.); *Jabbour* v. *Custodian of Israeli Absentee Property* [1954] 1 W.L.R. 139; *Arab Bank Ltd.* v. *Barclays Bank* (*Dominion, Colonial and Overseas*) *Ltd.* [1954] A.C. 495, at 534 (*per* Lord Reid), at 537 (*per* Lord Cohen).

14 (1886) 17 Q.B.D. 309.

15 [1927] 1 K.B. 669, C.A.

16 See Dicey, *supra*, Rule 92, p. 558; and by contrast, Rules 89–91.

17 [1959] 2 W.L.R., at p. 269.

18 Willmer L.J. applied in fact a method of ascertaining the proper law similar to that used in *The Njegos* [1936] P. 90. The writer has had the advantage of seeing a transcript of the judgments: this point does not come out in either the *Weekly Law Reports* (at p. 293) or in the *All England Reports* (at p. 246).

doctrine.[19] Much more important: both Jenkins and Romer L.JJ.[20] and Willmer L.J.[21] expressed the view that if Cuban law was the proper law of the contract, any *renvoi* by that law to the law of Pennsylvania would be irrelevant. They agreed that "the principle of *renvoi* finds no place in the field of contract"[22] and that if Cuban law was the proper law, such law was the domestic law of Cuba and not its conflicts principles. The court dissociated itself from the often quoted *obiter dictum* of Lord Wright in *Vita Food Products Inc.* v. *Unus Shipping Co.*,[23] which has been interpreted as supporting the doctrine of *renvoi* in contract.

(6) Although it was not necessary to do so for the purpose of either ascertaining the *situs* of the company's liabilities or for the determination of the proper law of the contract or for the purpose of deciding whether the rolling stock had by Cuban law been effectively transferred to the trustee, the court *ex abundante cautela* dealt with the question whether the rolling stock was "movable" or "immovable" property (or, as the court put it, *per incuriam*, it is respectfully submitted, "personal" or "real" property, words which cannot possibly have any meaning in Cuba).[24] The point of interest is that in deciding the question the court applied the domestic law of Cuba, being the *lex situs*.

(7) The alternative claims for damages by reason of conversion or breach of covenant not to assign were, as the court pointed out, academic. Nevertheless, the court considered them,[25] applying on the tort issue the law of Cuba which, of course, was both the *lex situs* and the *lex loci delicti*, and referring to that law to determine whether the trustee had acquired the right to immediate possession, which according to English law is a prerequisite for a claim in conversion.[26] The covenant to assign could have been broken only if the agreement of lease was still in existence at the time of the alleged breach, which again depended on whether, according to the proper law of the agreement, *i.e.*, the law of Pennsylvania, the doctrine of "holding over" applied. There being no proof of Pennsylvanian law on this point, English law was applied, and the court held that the covenant had been broken.[27]

(8) On the question of quantum, the court, affirming Wynn-Parry J., held that the trustee was entitled to prove for the sum total of the outstanding instalments of rental plus his expenses, or alternatively, for damages for conversion or breach of the

[19] [1959] 2 W.L.R. 273; [1959] 1 All E.R. 233, 246. [20] [1959] 2 W.L.R. 277.
[21] *Ibid.*, p. 293.
[22] Words used both by Jenkins L.J. and Willmer L.J.
[23] [1939] A.C. 277, at p. 292. These are the words which Falconbridge, *Selected Essays on the Conflict of Laws*, 2nd ed. (1954), p. 404, called a "*lapsus calami*."
[24] For the difference between the two distinctions, see Dicey, *supra*, pp. 496 *et seq.*: Cheshire, *Private International Law*, 5th ed. (1957), Chap. 14.
[25] [1959] 2 W.L.R. 278–281.
[26] See Dicey, *supra*, p. 952. [27] [1959] 2 W.L.R. 280.

covenant not to assign, but that, being a trustee, it had to limit its proof to the total amount for which it was still accountable to the certificate holders as *cestuis que trust*, *i.e.*, capital, premium and interest on the outstanding certificates, and its expenses. The court further held that, whereas, on the "breach date" or "due date" principle,[28] each instalment of rentals had to be converted into sterling at the rate of the date when it was due, the right of the certificate holders as *cestuis que trust* was not subject to the breach date rule. They were entitled to a dollar amount to be converted into sterling as at the date of the commencement of the winding up. This made a considerable difference in favour of the trustee, because of the devaluation of sterling which had occurred many years after the last instalment had been due, but prior to the commencement of the winding up. The breach date rule was justified by the court on the old and, it is respectfully submitted, unconvincing ground that "a contract to pay a sum in foreign currency is equivalent to a contract to deliver a chattel, and that failure to deliver it on the due date constitutes a breach of contract, for which damages must be assessed at the time of the breach,"[29] and it was emphasised that *cestuis que trust*, not claiming for breach of contract, are not affected by this, and are entitled to the full amount in the currency in which their claims are expressed. Will the House of Lords take this opportunity of overruling the breach date rule as applied to liquidated amounts due under contract?[30] Willmer L.J. dissented on the quantification of the claim,[31] but his dissent did not refer to any point of general legal principle. It turned on factual features and on the procedural history of the case, an analysis of which would transcend the purpose of this Note.

O. K.-F.

A Variation on the Theme of Donaldson *v.* Donaldson[1]

In *Stone* v. *Stone*[2] the husband petitioner instituted proceedings (which were undefended) in England for a divorce on the grounds

28 See Dicey, *supra*, Rule 177 (2) (a), p. 914.
29 [1959] 2 W.L.R., at p. 290.
30 With regard to liquidated sums the point has never been decided by the House of Lords, although it has been decided by the Court of Appeal. The point was expressly left open for argument in the House of Lords in the present case; [1959] 2 W.L.R. 288.
31 *Ibid.*, pp. 293 *et seq.*
1 [1949] P. 363, noted by Lipstein (1949) 26 B.Y.I.L. 469. In this case Ormerod J. (as he then was) held that an R.A.F. officer stationed in Florida during the late war had acquired a domicile in that state: he liked the country and had arranged for his wife and children to join him there, which they did. While he did not intend to leave the service at first, his views on this matter changed when he saw that his marriage was breaking up because he thought that a divorce would close the door to promotion. A further factor tending to establish a Florida domicile was that he wished to comply with the expressed desire of the American woman he in fact married (after his wife had divorced him in Florida) not to leave the United States.
2 [1958] 1 W.L.R. 1287.

of desertion. It was necessary for him to show that he was domiciled in England at the commencement of the suit in the light of the following circumstances: He had married a girl in England in 1950, when he still possessed his domicile of origin in the State of Ohio, U.S.A. At all material times he was a serving member of the United States Army, which he had joined in 1946. His first visit to this country, however, had been in 1944 when he was in the merchant marine service. About a year after his marriage (whether he was stationed in England during this period the report does not make clear), the husband was posted to Korea, subsequently to Japan, and, in 1955, to Paris, where he was serving at the date of the proceedings. His wife had remained in England and, apparently, had deserted him in 1952.[3] From and after November, 1957, the husband spent his leaves from Paris in England at the home of the parents of an Englishwoman whom he wished to marry if he could obtain a divorce.[4] The husband had a room at that address; indeed, he had his own key to the premises and he kept his civilian clothes and other possessions there. His evidence was that in November, 1957, he had decided to remain in England for the rest of his life and not to return to America, and that he had ever since retained that intention. Moreover, he had spoken of this determination to three witnesses who were called, and he had also expressed the intention of buying a house in England when possible.

It is, of course, at once apparent that the situation under review differs materially from that obtaining in the two post-war English cases on servicemen's domicile,[5] for in each of them the point at issue was whether the husband had acquired a domicile of choice in the country in which he was stationed. In this case, the husband was not stationed in England at any time material to the issue of his domicile; thus, as Collingwood J. rightly remarked in the course of the trial,[6] the case presented features *primae impressionis* for an English court. The learned judge considered

[3] Accordingly, therefore, if the husband did not become domiciled in England until the end of 1957, the wife would have been domiciled in Ohio for the greater part of the three-year period immediately preceding the presentation of the petition.

[4] *Cf.* the position in the *Donaldson* case (*supra*); the husband there in fact came back to England because he found that his service career had not been jeopardised in the way he had feared and his American wife had relented from her insistence on remaining in America.

[5] *Donaldson* v. *Donaldson* (*supra*) and *Cruickshanks* v. *Cruickshanks* [1957] 1 All E.R. 889. In the latter case a Scotsman born and bred had joined a Scottish army regiment in 1945 and was stationed in Scotland; on transfer to the R.A.O.C. in 1949, he was posted to England, where he met and married an Englishwoman. They lived together in England; in 1952 the husband deserted her and in the following year was posted overseas. Willmer J. (as he then was) held that her petition for divorce failed for lack of jurisdiction, the husband never having at any time acquired a voluntary residence in England. The case repays study since it contains a discussion of the Scots case *Sellars* v. *Sellars*, 1942 S.C. 206.

[6] [1958] 1 W.L.R. at p. 1290.

the *Donaldson* case [7] at some length, citing this passage from the judgment of Ormerod J. (as he then was) [8]:

> "Counsel for the respondent must satisfy me that at the time of the divorce, which was in June, 1944, the respondent was not only residing in Florida but had made up his mind to reside there permanently and had thereby acquired a domicile of choice. The fact that his service duties would take him away from Florida for some considerable time—probably so long as he was serving—would not as I see it affect the matter so long as he was then living in Florida and had determined to continue to live there when he could; and I am satisfied having heard his evidence that this is what he did."

Collingwood J. accepted the evidence that in 1957 the husband conceived the desire to remain in this country and formed the intention to settle down here permanently, and stated himself to be satisfied that this intention had persisted since that time, and that the husband would be living here permanently had not his service commitments restricted his residence here to the periods of his leave. His Lordship, accordingly, considered the case to be covered by the *Donaldson* [9] decision "because it seems . . . that once it is held that a domicile of choice can be acquired by a person in a country in which his residence is enforced, and from which he may be removed at any time, then, *a fortiori*, he can acquire such a domicile elsewhere." [10]

The learned judge proceeded to discuss the South African decision, *Baker* v. *Baker*,[11] cited in Dicey's *Conflict of Laws*,[12] for the proposition that a serving member of the armed forces can acquire a domicile of choice in a country other than that in which he is stationed so long as he has established the necessary residence and formed the necessary intention. In that case, an Indian Army officer had decided in 1939, when in England, that he would settle in South Africa; he was recalled to the colours in India before he could leave England for South Africa, but, in 1943, he had spent three weeks' leave with his wife (who had gone there after he had left England [13]) in Cape Town. This occasion was the husband's first visit to South Africa, although he spent a further leave there in 1945. It must, however, be noted that, possibly like the petitioner in the *Stone* case,[14] the husband had at no time been

[7] *Supra.* [8] [1949] P. at p. 365.
[9] *Supra.*
[10] [1958] 1 W.L.R. at p. 1290.
[11] (1945) App.D. 708. The case is thus pre-*Donaldson* (*supra*).
[12] 7th ed., p. 108.
[13] It might be possible to argue that where a wife is sent on ahead to set up a home for the family in a new country or State, and the husband is to follow later, the husband becomes domiciled in the new country or State as soon as the wife arrives there. This contention was upheld in *Bangs* v. *Inhabitants of Brewster* (1873) 111 Mass. 382 and in *Burkhardt* v. *Burkhardt* (1937) 8 W.W. Harr. 492; 193 A. 924, but was rejected in *Hart* v. *Horn* (1867) 4 Kan. 232.
[14] *Supra.*

stationed in the country of his alleged new domicile. On these facts, the Appellate Division of the Supreme Court of South Africa held that, as the evidence showed that the husband arrived in Cape Town with the intention of making his home there, he was domiciled in Cape Province despite the fact that he knew he would normally be absent therefrom during the continuation of hostilities. His Lordship then stated [15]: "In the present case it is true that at the time when the husband first formed the final and deliberate intention to abandon his domicile of origin and establish a new one in this country, he was here as a soldier on leave. That is, of course, an element to be taken into consideration in deciding whether he did in fact firmly decide to make his home here. But accepting, as I do, that he then formed that intention, then the character and duration of his residence here becomes immaterial—see *Bell* v. *Kennedy*." [16]

Accordingly, the husband was held to be domiciled in England and, the desertion being proved, a decree nisi was granted. This result is to be welcomed as bearing out the statement of Willmer J. (as he then was) [17] that "there is no doubt that in the more recent authorities a more liberal attitude towards the question of the acquisition by serving soldiers of a domicile of choice had developed."

The case under review may be usefully compared with *Re E. R. Smith, decd.*,[18] which just falls the other side of the line. A Scotsman had left his domicile of origin in Scotland and enlisted, at the age of eighteen, in the Army; in due course he married an English girl and, a few years later, obtained his discharge and pension. He then obtained a post as canteen steward to a regiment stationed at Hounslow, the place where he had married his wife and where he told her he wished to be buried. He followed his regiment to Scotland and Ireland; in 1895 he died whilst the regiment was quartered in Dublin. He had had a banking account at Leeds during the last six years of his life. Chitty J. refused to hold the man to have died domiciled in England, pointing out that [19] "he never bought a house or established himself in any way except so far as related to his business, which was an itinerant one. A man who had actually made his choice and fixed his abode would not merely say he would so do, but would say that he had done so. What was required to show that a new domicile had been acquired was permanent and fixed

[15] [1958] 1 W.L.R. 1290.

[16] (1868) L.R. 1 Sc. & Div. 307; doubtless his Lordship had in mind Lord Chelmsford's statement (at p. 319) that "it may be conceded that if the intention of permanently residing in a place exists, a residence in pursuance of that intention however short, will establish a domicile."

[17] In *Cruickshanks* v. *Cruickshanks* [1957] 1 All E.R. at p. 891.

[18] (1896) 12 T.L.R. 223.

[19] *Ibid.*, at pp. 223–224. This would, it is submitted, constitute a faultless *ratio* today of *Re Macreight* (1885) 30 Ch.D. 165.

intention and actual residence." Although this decision might at first sight cause one to think that it exemplifies the unwillingness of our courts to hold that a man had lost his domicile of origin, a moment's reflection will lead to the realisation that it is perfectly correct—the deceased never had so much as a *pied à terre* in any of the countries in which he resided in his camp-following capacity. In our case, the American soldier, *animo et facto*, had made England the hub of his existence.

P. R. H. Webb.

Proof of Foreign Law

Choice of law problems in the English conflict of laws are now discussed at a high level of sophistication. It is paradoxical to note therefore that the practical application of the chosen solution depends on the much less sophisticated idea that foreign law is a fact, readily capable of ascertainment with a high degree of precision. Reflection suggests, however, that English law is unlikely to be alone in having unsolved problems, on which no single person, however learned, can speak with confidence, and experience shows that often it is less difficult to choose the appropriate law than to discover its content.

The trial judge called upon to discover the foreign rule may be presented with many difficult problems. Where there is only one expert witness he has little choice but to accept his evidence, even though he may regard it with suspicion [1]; unless, indeed, it is so improbable that he can find that no system of law could so hold.[2] Where there is a conflict of opinion between the experts the judge may be faced with the frightening task of settling a question as yet unsettled by the *lex causae*.[3]

Where the parties lead no evidence the judge is left with no option but to apply English law. He cannot take judicial notice of foreign law, though in *Saxby* v. *Fulton* [4] Bray J. took judicial notice that roulette was not illegal in Monte Carlo—a procedure condemned as heretical by Cheshire [5] but cited without apparent disapproval by Dicey [6]; nor can he follow previous cases in which the same point of foreign law has been considered.[7] Such a rule has an obvious tendency to produce arbitrary and artificial results and it is interesting to note that in the recent case of *Re Sebba* [8] Danckwerts J.

[1] See, *e.g.*, Roxburgh J. in *Re Banque des Marchands de Moscou* [1957] 3 W.L.R. 637, at 647.
[2] *Buerger* v. *N.Y. Life Assurance Co.* (1920) 96 L.J.K.B. 930, 941.
[3] See, *e.g.*, Wynn-Parry J.'s struggle with Spanish notions on *renvoi* in *Re Duke of Wellington* [1947] Ch. 706.
[4] [1909] 2 K.B. 208, 211.
[5] p. 129.
[6] p. 1108.
[7] See, *e.g.*, *Re Marseilles Extension Railway and Land Co.* (1885) 30 Ch.D. 598; *Lazard Bros.* v. *Midland Bank* [1933] A.C. 289.
[8] [1958] 3 W.L.R. 605; [1958] 3 All E.R. 393.

disregarded it. In this case the testator died domiciled in England but owning shares in Canada and elsewhere. Dominion and Province of Ontario succession duties were paid on these shares in Canada. The substantive question was whether such duties were to be paid out of the residue of the estate or out of the specific legacies. This in turn involved a finding as to the nature of the Dominion and Ontario succession duties. No expert evidence was led on this question and according to the established rule Danckwerts J. should accordingly have treated these duties as being of the same nature as English duty. However, the nature of Dominion succession duty was considered in *Re Goetze*,[9] where expert evidence had been given, the effect of which was summarised by Jenkins L.J. After reading this summary Danckwerts J. observed: "I think that I am entitled to take that as a fair statement of the nature of the Dominion Succession Duty." Similarly, no evidence was led as to the nature of Ontario Succession Duty, but counsel provided the court with a copy of the Ontario Succession Duty Act, which Danckwerts J. considered. This appears difficult to reconcile with the rule that foreign law cannot be proved merely by putting the text of a foreign enactment before the court.[10] As a practical solution one may sympathise with the course taken by the learned judge, especially since he was dealing with common law systems whose concepts and techniques are basically the same as those of English law, but it would be of interest to know why he thought himself entitled to adopt it.

M. P. Furmston.

Conflict of Laws—Recognition of Foreign Divorce Decrees

It is often true that decisions which occupy the attention of the layman do not hold an equal interest for the lawyer, in that they rarely contain rulings on points of legal significance. The recent case of *Mountbatten* v. *Mountbatten*,[1] while arousing considerable interest outside the profession, does not lay down any new principles regarding the recognition of foreign divorce decrees. Nevertheless the judgment of Davies J. provides a clear exposition of the rules applicable in this sphere of the law.

The facts can be shortly stated. The parties, who both remained domiciled in England throughout the proceedings, married in the United States in 1950. Two years later the husband returned to the United Kingdom, where he continued to reside during the relevant period. The wife remained in the United States. In December, 1952, she commenced a petition for separation in the Supreme Court of New York. Interlocutory proceedings in this suit lasted until

[9] [1953] Ch. 96.
[10] *Buerger* v. *N.Y. Life Assurance Co.* (1920) 96 L.J.K.B. 930, 940.
[1] [1959] 1 All E.R. 99; also reported [1959] 2 W.L.R. 128.

May, 1954, when the action was discontinued, the wife now presenting a petition for divorce in a Mexican court. This was filed on May 21 and a decree pronounced in favour of the wife the following day. The court assumed jurisdiction on the grounds that the petitioner was resident in Mexico, although she had only been present in the jurisdiction for twenty-four hours, and also because both parties submitted to the jurisdiction. A Mexican lawyer represented the husband during the proceedings, acting under a power of attorney executed in London. The present action was instituted in England by the husband for a declaration that the Mexican decree had extraterritorial effect, and would be recognised here.

It was clear that since the present petitioner was domiciled in England, and thus the wife was also, the decree could not be recognised on the well-established principle that it was NOT a decree of the court of the domicile. Yet an ingenious argument was suggested by counsel that it could be recognised by a union of two exceptions to the domicile principle of recognition. *Travers* v. *Holley* [2] and the subsequent line of cases following that decision are clear, that where a wife has been resident three years in a country, a decree of the courts of that country will be recognised in England, despite the fact that it was not a decree of the court of the domicile. *Armitage* v. *Att.-Gen.*[3] establishes that if the court of the domicile recognises the decree, then it will be recognised in this country, again despite the fact that it was not actually pronounced by a court of the domicile. The wife in this case had been resident in New York for three years, and had she obtained a decree there it would undoubtedly have been recognised in England, following *Travers* v. *Holley*. It was shown by the testimony of expert witnesses that the New York courts would have recognised the Mexican decree; had the wife been domiciled in New York an English court could have recognised the decree on the authority of *Armitage* v. *Att.-Gen.* It was argued in *Mountbatten* v. *Mountbatten* that if the courts of the country where the wife has been resident three years recognise the decree, then it also should be afforded recognition in England, even though it was given by the courts of a third State, where the petitioner was not domiciled. This was the position in the present case, but Davies J. declined to accede to this proposition, dismissing it as " . . . a wholly illegitimate extension of the principle of comity on which *Travers* v. *Holley* and the subsequent cases turn." [4]

In reaching this conclusion the learned judge surveyed at length the general principle behind the recognition of foreign divorce decrees. Ever since *Le Mesurier* v. *Le Mesurier* [5] it has been the rule that only the decrees of the courts of the domicile will be recognised, and even the statutory exceptions to this seek to preserve as

[2] [1953] 2 All E.R. 794.
[3] [1906] P. 135.
[4] [1959] 1 All E.R. 99, 118.
[5] [1895] A.C. 517.

far as possible the conception of domicile as a basis for recognition. This is particularly true of section 18 (1) (*a*) of the Matrimonial Causes Act, 1950, the effect of which is notionally to continue the English domicile of a wife for the purpose of the proceedings, while section 18 (3) of the same Act is also significant in this connection.[6] The *Travers* v. *Holley* exception is of a similar nature, being another inroad on the old common law principle of recognition. In Davies J.'s opinion such inroads should be restricted as far as possible; citing his own words in *Dunne* v. *Saban*[7] he says: "In my judgment the observations in *Travers* v. *Holley* merely decide that this court will recognise the right of other (foreign) courts to encroach on the principle only to the extent to which it also does."[8] The case before him, viewed in this light, presented no difficulties. The present decree did not come within the domicile principle of recognition, or an established exception to it, and therefore could not be recognised. Any other decision would necessarily be a further encroachment on the established rule, and be entirely unwarranted on the present state of the authorities.

In dealing with the *Travers* v. *Holley* and *Armitage* v. *Att.-Gen.* exceptions Davies J. makes some interesting points. Referring to the former he states: "It is right that I should mention that counsel for the Queen's Proctor expressly desired to keep open for future argument in the appropriate place the question whether *Travers* v. *Holley* was rightly decided."[9] Of *Armitage* v. *Att.-Gen.* Davies J. expresses an opinion which has been voiced before, that it is doubtful whether the actual decision in that case justified the proposition it is normally cited for—"... a more accurate statement of the effect of that case would be that our courts will recognise a decree of divorce which is recognised as valid by the court of the husband's domicile as having been pronounced by a court in the jurisdiction of which the wife had obtained a separate domicile."[10]

Perhaps the most interesting feature of the case is that the practice of the foreign court in permitting collusion was held to be irrelevant.[11] This is supported by Bucknill J. in *Crowe* v. *Crowe*.[12] The only ground on which such a decree could be attacked would be

[6] "... the issues shall be determined in accordance with the law which would be applicable thereto if both parties were domiciled in England at the time of the proceedings."

[7] [1954] 3 All E.R. 586, 592.

[8] [1959] 1 All E.R. 99, 117.

[9] *Ibid.*, at 115. And see Blackburn in (1954) L.Q.R. 471, where it is shown that that case appears contrary to *Shaw* v. *Gould* (1868) L.R. 3 H.L. 55, and *Warden* v. *Warden*, 1951 S.C. 508, not cited in *Travers*.

[10] [1959] 1 All E.R. 99, 115. For similar remarks, see 17 *Transactions of the Grotius Society*, pp. 131 and 134. Dr. Morris criticises the decision strongly—(1946) 24 Can.B.R. 73, and it only appears to have been directly followed once in England—*Clarke* v. *Clarke* (1921) 37 T.L.R. 815.

[11] [1959] 1 All E.R. 99, 104, citing 7 Halsbury (3rd ed.), para. 203.

[12] [1937] 2 All E.R. 723, 725, citing Gorell Barnes P. in *Bater* v. *Bater* [1906] P. 209.

if it could be shown to be contrary to natural justice, thought Davies J. This latter proposition would appear to be supported by Sachs J. in *McAlpine* v. *McAlpine*,[13] but it is interesting to note that Dr. Morris [14] dissents from this view, and holds that even where the respondent did not have notice of the foreign proceedings a decree could still be given recognition in England.[15]

In conclusion Davies J. stated that any inconvenience the parties may have suffered was due to the fault of their advisers, as had the decree been obtained by the wife in New York it would have been recognised here. Alternatively, either party could have petitioned in England. A possible factor preventing this course may have been that the grounds relied on may not have been thought sufficient to support a petition in either New York or this country.

Michael J. Higgins.

High Trees in New Zealand

Application of the principle, considered in *Central London Property Trust, Ltd.* v. *High Trees House, Ltd.*[1] and *Combe* v. *Combe*,[2] by McGregor J. in *P.* v. *P.*,[3] was noted in this journal last year.[4] Equitable estoppel has more recently been submitted to a reconsideration by the New Zealand Court of Appeal in *Commissioner of Inland Revenue* v. *Morris*.[5]

A mother transferred a debenture to her son by deed, and the son covenanted to pay his mother £125 every six months during her life "except in so far as for any specific half-year the said [mother] shall waive payment." The mother orally waived each of the first ten instalments, and later by deed confirmed the waiver of £1,250. She having died, it was material for death duty purposes to decide whether the oral waivers were legally effective.

Gresson P., giving the judgment of himself and Cleary J., held that (apart from any question of equitable estoppel) it was not competent for the parties to a deed "to provide in a manner which would be legally effective that what the law has laid down as essential could in their particular case be dispensed with." [6] In other words, having decided that this one purported to do so, they held that a deed could not provide for its own parol variation without consideration. Turning then to the High Trees doctrine,

13 [1957] 3 All E.R. 134, 139 and 140.
14 Dicey (7th ed.), p. 306.
15 The same learned author elaborates this view in 29 B.Y.I.L. 283 at 285, where the cases are discussed in detail. Dr. Cheshire appears to support the contrary position—*P.I.L.* (5th ed.), pp. 643–644.
1 [1947] K.B. 130.
2 [1951] 2 K.B. 215.
3 [1957] N.Z.L.R. 854.
4 21 M.L.R. 185.
5 [1958] N.Z.L.R. 1126.
6 [1958] N.Z.L.R. 1134.

they reviewed the authorities and came up against the question agitated in the note on *P.* v. *P.*, namely, whether, before the estoppel operates, the defendant must show that he has altered his position in reliance on the waiver in some other way than merely not paying money he would otherwise have paid. The learned judges came to the conclusion that he must. They said: "The essence of the doctrine is that a person is not permitted to enforce legal rights when it would be unjust that he should be allowed to do so, having regard to the dealings which have taken place between the parties. But those dealings must amount to one party having been led by the attitude of the other to alter his own position." [7] That not having happened here, there was no equitable estoppel.

The majority thus followed the general tendency [8] to get away from the implications of the judgment of Denning J. in the *High Trees* case itself, back to the earlier formulations in *Hughes* v. *Metropolitan Ry.*[9] and *Birmingham and District Land Co.* v. *L. & N. W. Ry.*[10] This is a regrettable and unnecessary movement. The test for the application of an equitable principle should be what is equitable in the particular case. It would usually be inequitable to enforce a promise on whose informal and gratuitous release or diminution the defendant had relied by altering his legal position. It would usually be equitable to enforce a promise, notwithstanding an informal and gratuitous release or partial release, if the defendant had done nothing (beyond omitting to pay in full) in reliance on the release. But not always. Room for manoeuvre could be left for those cases where enforcement in full of the original obligation becomes inequitable, despite the absence of detriment to the defendant; in this particular case, by holding that there was not only no alteration by the defendant of his legal position in reliance on the oral waiver, but also no other factor making it inequitable to disregard that waiver.

North J. agreed with the majority as to the result, but on the narrow ground that the original deed did not, on its true construction, contain a covenant that the payments could be waived by parol, any rule of law to the contrary notwithstanding. The learned judge said that if he was wrong as to that, and that the interpretation made by his brethren was right, he would not be "quite as sure as they are that the doctrine of equitable estoppel could not be invoked, if indeed the common law would not recognise such a covenant." [11] He thought it could be argued that "the debtor could show a detriment arising from the circumstance

[7] [1958] N.Z.L.R. 1136.
[8] See, *e.g.*, *Tool Metal Manufacturing Co., Ltd.* v. *Tungsten Electric Co., Ltd.* [1955] 1 W.L.R. 761.
[9] (1877) 2 App.Cas. 439.
[10] (1888) 40 Ch.D. 268.
[11] [1958] N.Z.L.R. 1137.

that his creditor had assured him in positive terms in a solemn deed that an oral release would suffice." [12]

Greater precision in equitable doctrines is always to be welcomed, but not when it excludes relief from inequitable obligations in future unforeseen circumstances.

L. A. Sheridan.

Fair Wear and Tear: The Last Word?

Under the provisions of the First Schedule to the Rent Act, 1957, the "rent limit" of premises which remain rent controlled depends on the respective repairing obligations of the landlord and tenant. In *Regis Property Co., Ltd.* v. *Dudley* [1] the county court judge, in considering the effect of the tenancy agreement of a flat in Chelsea Cloisters, came to the conclusion that the cost of repairs was shared about equally between the landlords and the tenant. The decision on this point was affirmed by the Court of Appeal, and the House of Lords, by a majority, now dismissed the landlords' appeal.

The decision turned largely on the interpretation of the Rent Act, 1957, but the case is likely to remain a leading authority, long after the Rent Act has been repealed, on a subsidiary question which most of their Lordships thought could make little difference to the result of the case.

The tenant had covenanted to keep the interior of the flat "in good and substantial repair . . . (fair wear and tear excepted)." Until recently the leading case on the exception in brackets was *Taylor* v. *Webb*,[2] but as a result of the attempt by the Court of Appeal in *Brown* v. *Davies* [3] to overrule the earlier decision it became difficult to be sure what the law was. The House of Lords has now unanimously spoken in favour of overruling *Taylor* v. *Webb*; perhaps the last word has been said and the words will henceforth have a known and certain meaning.

It will be recalled that in *Taylor* v. *Webb* the effect of the clause was virtually to negative the preceding covenant to repair in ordinary use of the premises, limiting its application "to such matters as wilful damage, and fire, floods and other extraordinary events." [4] Their Lordships have now reinstated the judgment of Talbot J. in *Haskell* v. *Marlow*,[5] who said:

> "Reasonable wear and tear means the reasonable use of the house by the tenant and the ordinary operation of natural

12 [1958] N.Z.L.R. 1138.

1 [1958] 3 W.L.R. 647; [1958] 3 All E.R. 491, H.L.

2 [1937] 2 K.B. 283, C.A.

3 [1958] 1 Q.B. 117; [1957] 3 W.L.R. 818; [1957] 3 All E.R. 401; noted at (1958) 21 M.L.R. 292, where the facts of *Taylor* v. *Webb* and *Haskell* v. *Marlow*, referred to in this note, are summarised. The Court of Appeal has again distinguished *Taylor* v. *Webb*, on another point, in *Holiday Fellowship, Ltd.* v. *Hereford* [1959] 1 W.L.R. 211; [1959] 1 All E.R. 433.

4 Megarry and Wade, *The Law of Real Property*, p. 634.

5 [1928] 2 K.B. 45, D.C., at p. 58.

> forces. The exception of want of repair due to wear and tear must be construed as limited to what is directly due to wear and tear, reasonable conduct on the part of the tenant being assumed. It does not mean that if there is a defect originally proceeding from reasonable wear and tear the tenant is released from his obligation to keep in good repair and condition everything which it may be possible to trace ultimately to that defect. He is bound to do such repairs as may be required to prevent the consequences flowing originally from wear and tear from producing others which wear and tear would not directly produce."

In that case Salter J. took a rather different view, equating the "reasonable" in "reasonable wear and tear" to "reasonable in amount."[6] In preferring Talbot J.'s judgment, the House has shown that *Taylor* v. *Webb* was wrongly decided, but that Brown v. *Davies*, where the Court of Appeal criticised *Taylor* v. *Webb*, was probably also wrong on this point.

In *Brown* v. *Davies*[7] the tenant had agreed to keep the interior of a bungalow "clean and in good repair and condition and decorated except as to dilapidations or damage resulting from reasonable wear and tear. . . ." The facts were that "at least five years had passed since any decoration had been carried out; the entrance hall was not in good condition, with plaster cracks in the ceiling; the plaster in the kitchen was badly cracked at the side of the grate, and the paintwork was fair; the back kitchen showed flaking on the walls; the bathroom walls were dirty and the ceiling flaking; the bedroom showed slight signs of damp, with tarnished decoration; in the sitting-room the paper was peeling and the ceiling was cracked in three or four places."[8] In expressing the view that the tenant was not protected by the "reasonable wear and tear" exception, the Court of Appeal were clearly following the line of thought of Salter J. rather than Talbot J.,[9] except possibly in respect of the slight signs of damp in the bedroom, to which no special reference was made. The facts given may profitably be compared with Lord Denning's description of the effect of a fair wear and tear clause[10]:

> "It exempts a tenant from liability for repairs that are decorative and for remedying parts that wear out or come adrift in the course of reasonable use, but it does not exempt him from anything else. If further damage is likely to flow from the wear and tear, he must do such repairs as are necessary to

[8] "To bring dilapidations within the protection of such an exception . . . I think that two things must be shown: first, that the dilapidations for which exemption is claimed were caused by normal human use or by the normal action of the elements, and, secondly, that they are reasonable in amount. . . ."—[1928] 2 K.B., at p. 57.

[7] Note 3, above.

[8] *Per* Lord Evershed M.R. [1958] 1 Q.B., at p. 127.

[9] In *Haskell* v. *Marlow*, above.

[10] [1958] 3 W.L.R., at p. 674; [1958] 3 All E.R., at pp. 511–512.

stop that further damage. If a slate falls off through wear and tear and in consequence the roof is likely to let through the water, the tenant is not responsible for the slate coming off but he ought to put in another one to prevent further damage."

It is never easy to apply abstract rules to concrete cases, and it is likely that in the years to come we shall see more reported decisions on the effect of the clause on particular facts. We must, however, be grateful that so soon after the doubts raised by *Brown* v. *Davies* [11] conveyancers have an authoritative statement of the law to guide them.

AUBREY L. DIAMOND.

AMENDMENT OF PLEADINGS

CONSIDERATIONS of space made it necessary to omit from my note [1] on the decision at first instance in *G. L. Baker, Ltd.* v. *Medway Building & Supplies, Ltd.*,[2] a section in which I ventured to criticise the refusal of the learned judge in that case to permit the defendant company to amend its defence. It seems, therefore, appropriate that I should write to applaud the welcome reversal of the decision on that point by the Court of Appeal.[3] This case should not be dismissed, even by the academic lawyer who is sometimes accused of disregarding such matters, as dealing merely with pleading or practice. Indeed, it is clearly of greater practical importance in ensuring that the law achieves justice than many decisions on the substantive law, and I would respectfully commend the attitude taken by all the members of the Court of Appeal to the problem involved. It is highly satisfying that this court has reaffirmed the liberal interpretation of the appropriate rule [4]—as expressed, for instance, in the classic passages cited in the *Annual Practice* setting out the general principles which should be adopted as to when leave to amend should be given. These are the statements of Bramwell L.J.[5]: "My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting *mala fide*, or that, by his blunder, he has done some injury to his opponent which could not be compensated for by costs or otherwise," and that of Brett M.R.[6]: ". . . however negligent or careless may have been the first omission and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs."

11 See, too, R. E. Megarry, Q.C. (1958) 74 L.Q.R. 33.
1 22 M.L.R. 87.
2 [1958] 1 W.L.R. 1216; [1958] 2 All E.R. 532.
3 [1953] 1 W.L.R. 1216 at p. 1225; [1958] 3 All E.R. 540.
4 R.S.C., Ord. 28, r. 1.
5 In *Tildersley* v. *Harper* (1878) 10 Ch.D. 393 at p. 396.
6 In *Clarapede & Co.* v. *Commercial Union Association* (1883) 32 W.R. 262 at p. 263.

Obviously, the injury or injustice to the opponent referred to does not, and could not, mean or include the possibility that the amendment may result in the defeat of an opponent who might have anticipated victory on the original pleadings. A man cannot justly complain if an unmerited advantage of this kind is taken away from him. The sort of case where amendment would, however, properly be refused on the ground of injury or injustice, is where a plaintiff sought thereby to set up a fresh claim in respect of a cause of action which, since the issue of the writ, had become barred by the Statutes of Limitation.[7]

It is easy to see that the art of drafting pleadings may, to some minds, exert a fascination similar to that of a game of chess, where one false move may lead irrevocably to disaster, and where quarter is neither given nor spared. Pleading, however, is neither a game to be played rigidly according to the rules, nor yet an exercise in logical expression for lawyers, but nothing more nor less than a means of clarifying the issues in dispute between the parties. Something would be at fault if the lay litigant were to be penalised to the extent of losing his rights altogether by some technical slip or mistake on the part of his lawyer in this preliminary stage of ascertaining what are the real points in dispute, at any rate when the slip or mistake is capable of remedy without any injustice to his opponent. That this is the true view may, it is submitted, now be regarded for practical purposes, as finally established by the Court of Appeal decision in the *Baker* case, approving earlier, similar decisions. In giving the leading judgment, Jenkins L.J. made it clear that, in his opinion, the trial judge in that case had erred in principle in refusing the amendment where the result was that "the real matter in issue between the parties would not be decided, for the case would proceed on an assumed state of facts which, more likely than not, was wholly at variance with and bore no relation to the true facts of the case."[8] Elsewhere in his judgment he said: ". . . it is a guiding principle of cardinal importance on this question that, generally speaking, all such amendments ought[9] to be made 'as may be necessary for the purpose of determining the real questions in controversy between the parties.'"[10] This principle was followed, even though it involved overcoming the well-known reluctance of the Court of Appeal to disturb the exercise of a discretion vested in the trial judge.[11]

[7] See *Weldon* v. *Neal* (1887) 19 Q.B.D. 394; *Steward* v. *North Metropolitan Tramways* (1885) 16 Q.B.D. 178.

[8] [1958] 1 W.L.R. at p. 1236; [1958] 3 All E.R. at p. 549.

[9] The relevant rule (R.S.C., Ord. 28, r. 1) uses the word "shall"; but Jenkins L.J. did not read this as meaning obligatory in all circumstances.

[10] [1958] 1 W.L.R., at p. 1231; [1958] 3 All E.R., at p. 546. The citation is from R.S.C., Ord. 28, r. 1.

[11] See especially *per* Romer L.J. [1958] 1 W.L.R., at p. 1239; [1958] 3 All E.R., at p. 552.

It may be observed that a similar point has arisen in other recent cases. Shortly before the *Baker* case a liberal interpretation of the rule had been supported by the Court of Appeal in *Nelson* v. *Nelson*,[12] though this decision does not appear to have been referred to in the later case. Another recent case was *City and Westminster Properties (1934), Ltd.* v. *Mudd*,[13] where, in a landlord and tenant case, the judge permitted an amendment to the defendant tenant's pleadings which enabled him to rely successfully on the principle of *Re William Porter & Co., Ltd.*[14]

Further, it is satisfactory to see that *Warner* v. *Sampson*,[15] another recent case in which a technical fault on the part of counsel was visited upon the lay client, has also been reversed on appeal.[16] This, it will be remembered, was also a landlord and tenant case, in which it was held that, owing to a lapse on the part of counsel drafting the tenant's defence, there was a denial of the landlord's title which entitled the landlord to forfeit the lease. The tenant was not permitted to withdraw his defence, and consequently it was held that the lease was forfeited without even the possibility of relief being granted under the provisions of section 146 of the Law of Property Act, 1925. All the members of the Court of Appeal concurred in reversing this decision on the ground, contrary to the plaintiff's argument, that the general traverse in the defence did not constitute such a denial of title as would entitle the landlord to forfeit the lease.[17] This view, which reflects the established principle that questions of forfeiture are *stricti juris* will, it is thought, meet with general approval.

It was not, therefore, strictly necessary for the court to consider the effect of amending the pleading, but both Hodson and Ormerod L.JJ. expressed the opinion, on the supposition that the defence contained an otherwise effective denial of title, that once the pleading had been amended by removing from it the denial of title which it had previously contained, it would be too late for the landlord to forfeit. With respect, their judgments do not appear to take proper account of the distinction that can be drawn between cases, on the one hand, where the pleadings are being considered *per se* purely as defining the issue, where it is clear that, once pleadings have been amended, only the amended pleadings are relevant or material before the court in ascertaining the issues between the parties: and cases, on the other hand,

12 [1958] 1 W.L.R. 894; [1958] 2 All E.R. 744. Romer L.J. was a party to both decisions.
13 [1958] 3 W.L.R. 312; [1958] 2 All E.R. 733.
14 [1937] 2 All E.R. 361.
15 [1958] 1 All E.R. 44, noted in (1958) 21 M.L.R. 303. See also *Warner* v. *Sampson* (*No.* 2) [1958] 1 All E.R. 314.
16 [1959] 1 All E.R. 120; also reported [1959] 2 W.L.R. 109.
17 This involved overruling *Kisch* v. *Hawes Bros., Ltd.* [1935] Ch. 102, which the judge in the court below had felt bound to follow. Lord Denning went further and stated that in his opinion a denial in a pleading by a tenant of his landlord's title does not today give rise to forfeiture.

where a collateral effect of the original pleading is in question, where there seems much to be said for the view that such collateral effect should be as much, or as little, capable of being nullified or altered as if the relevant statement were contained in some other document.[18] On the assumption, which was not disputed in *Warner* v. *Sampson*,[19] that a defence[20] signed by counsel binds the lay client,[21] it is a little difficult to see why the fact that, for pleading purposes, amendment of the defence may be permitted, should enable the defendant successfully to contend, in effect, that the original defence must be treated as if it had never been made. The question seems to be really one of evidence: namely, whether the original unamended pleading is admissible in evidence.[22] Reference may be made to the decision in *Farr Smith & Co.* v. *Messers, Ltd.*,[23] one of the rare cases where the collateral effect of a pleading has been material. That case, it will be remembered, is usually cited as authority for the proposition that a pleading in an action signed by counsel may constitute a sufficient memorandum for the purpose of the Statute of Frauds. Though the decision may be capable of being distinguished, the significant fact, for present purposes, is that the pleading successfully relied upon was a paragraph in the original defence before amendment. Admittedly, the point about amendment was not taken, but this is, perhaps, ambiguous. It might be contended that it was thought hopeless to argue that this pleading must be totally disregarded.

In conclusion, it is respectfully suggested that the result actually reached in *Warner* v. *Sampson*[24] might have been arrived at by a rather different route. The argument must be taken in two stages. First, it is submitted that a claim for forfeiture on the ground of denial of title could not properly be made in the original action, but only in fresh proceedings. The denial of title, it is submitted, constitutes a separate cause of action, and one which was not in existence when the original writ was issued.

18 A denial of title, in whatever document it was contained, might, conceivably, be capable of being effectively withdrawn at any time prior to the issue of a writ of possession. The judgments, however, do not appear to have gone upon this ground, but to depend upon the nature of the document, *i.e.*, a pleading, in which the denial was contained.

19 *Supra.*

20 The argument applies equally to any other pleading.

21 Considerations of justice might lend weight to an argument that the lay client was not bound, on the ground that counsel's authority did not extend to the relevant statement since it was not incidental to the action but merely collateral. *Cf. Swinfen* v. *Lord Chelmsford* (1860) 5 H. & N. 890; *Ellender* v. *Wood* (1888) 4 T.L.R. 630. But see also *Farr Smith & Co.* v. *Messers, Ltd.* [1928] 1 K.B. 397. The lay client would, of course, be bound if he could be shown to have expressly authorised or adopted the particular statement.

22 See Wigmore on *Evidence*, 3rd ed., s. 1067. He suggests that the unamended pleading should be admitted, subject to the qualification that it must be shown that it was approved by the party against whom it is sought to be used.

23 [1928] 1 K.B. 397, apparently not cited in *Warner* v. *Sampson* (*supra*).

24 *Supra.*

Eshelby v. *Federated European Bank, Ltd.*[25] is authority for the proposition that the court has no jurisdiction to give leave to a plaintiff to amend his pleading so as to include a cause of action which was not in existence when the writ was issued.[26] It follows that any claim by the plaintiff based on the denial of title must be made in a fresh action. Secondly, assuming the first point to be right, it is submitted that in the fresh action the pleadings in the first action would be inadmissible. The leading case is *Boileau* v. *Rutlin*[27] where, in giving the judgment of a strong court, Parke B. said[28]: "It would seem that those,[29] as well as pleadings at common law, are not to be treated as positive allegations of the truth of the facts therein, for all purposes, but only as statements of the case of the party, to be admitted or denied by the opposite side, and if denied to be proved, and ultimately submitted for judicial decision. . . . But the statements of a party in a declaration or plea, though, for the purposes of the case, he is bound by those that are material, and the evidence must be confined to them upon an issue, ought not, it should seem, to be treated as confessions of the state of the facts stated." It may be observed that although Wigmore[30] regards it as illogical and unsatisfactory, he has no doubt that in English law it is settled that pleadings in other causes are excluded.[31]

P. H. Pettit.

The Provision of Alternative Cargoes

South African Dispatch Line v. *Owners of the Panamanian Steamship Niki*[1] is the most recent of an interesting line of cases dealing with the provision of alternative cargoes. Before describing it, however, certain previous cases must be mentioned by way of background.

In *Bunge y Born* v. *H. A. Brightman & Co.*[2] the principal question to be decided by the House of Lords was the interpretation of a clause in a charterparty which provided that the time for loading should not count if the cargo could not be loaded "by reason of obstruction or stoppages beyond the control of the charterers on

25 [1932] 1 K.B. 254, Divisional Court; affirmed C.A., at p. 423, but there was no appeal on this point. See also *Tottenham Local Board of Health* v. *Lea Conservancy Board* (1886) 2 T.L.R. 410, *per* Bowen L.J.; *Creed* v. *Creed* [1913] 1 Ir.R. 48; *Evans* v. *Bagshaw* (1870) L.R. 5 Ch.App. 340; *Att.-Gen.* v. *Avon Corporation*, 3 De G.J. & S. 637.

26 In no case can a new cause of action be introduced in a reply. See *Williamson* v. *London & North Western Ry.*, 12 Ch.D. 787.

27 (1848) 2 Ex. 665.

28 *Supra*, at pp. 680–681.

29 *i.e.*, bills in equity.

30 *Op. cit.*, ss. 1065, 1066.

31 The pleadings are admissible, however, to show the institution of the proceedings and the nature of the case put forward.

1 [1958] 3 W.L.R. 718; [1958] 3 All E.R. 590

2 [1925] A.C. 799.

the railways, or in the docks, or other loading places." It was held that the word "railways" meant railways in the port itself, and so the charterers could not bring themselves within the exception clause set out above, because all that they could show was that their failure to load the cargo was due to an "obstruction" on the railways leading from the interior of the Argentine to the port concerned, for its employees were engaged in a "go slow" movement as they were dissatisfied with their conditions of work.

The other matter which arose in the case in the High Court [3] and in the Court of Appeal [4] but was not argued before their Lordships was the extent of the duty of the charterers to provide an alternative cargo if they were prevented from loading the cargo, which they had originally chosen to ship. The charterparty provided that they were to load a full cargo of "wheat and/or maize and/or rye." After the loading of the wheat had commenced, the Argentine Government prohibited the export of wheat. In the High Court Bailhache J. held that the charterers became bound immediately to load an alternative cargo under the charterparty, and that they were not entitled to a reasonable time to see whether the prohibition would be removed and to make arrangements for loading the alternative cargo. He said that he intended to follow the decision of Rowlatt J. in *Owners of the SS. Ardgowan* v. *Royal Commission on Wheat Supplies* [5] decided two months earlier. In this case Rowlatt J., on similar facts, observed [6]: "In this case at the material moment the charterer is under an immediate liability to load wheat or maize or rye and he says 'here is a stoppage or prohibition that prevents me from loading wheat.' Then what has interfered with his immediate obligation to load the other cargo as to which there is no prohibition? I can see nothing. It seems to me here that he takes the risk, there is the obligation to load the cargo and if the loading is interrupted by an exception that does not cover the whole ground, the demurrage is for his account."

This case was presumably cited to the Court of Appeal in *Brightman & Co.* v. *Bunge y Born*,[7] but no mention of it is made in the judgments that were there delivered. The Court of Appeal reversed the judgment of Bailhache J. on this point. Bankes L.J. observed [8]: "It may well be that the charterers cannot escape a claim for breach of contract to supply such a cargo by saying that no wheat was procurable, if maize and/or rye were procurable. That conclusion is, however, a long way removed from the contention of the shipowners, which is that even if the charterers have decided to ship a cargo of wheat, and have made the arrangements

[3] (1923) 16 Ll.L.Rep. 200.
[4] [1924] 2 K.B 619.
[5] (1923) 15 Ll.L.Rep. 81.
[6] At p. 82.
[7] [1924] 2 K.B. 619.
[8] At p. 628.

to secure the same, which, apart from some unforeseen event, would have enabled them to fulfil their contract, yet if without default on their part the unforeseen event occurs and compels them to substitute maize and/or rye for wheat, they are not to be allowed the necessary time to make up their mind what is best to be done, and to alter their arrangements accordingly, but are bound by the fixed time for loading laid down in the charterparty. I cannot so read the contract. I think that a term must be implied giving the charterers a reasonable interval of time to enable them to deal with the altered conditions." Scrutton and Atkin L.JJ. delivered judgments to the same effect.[9]

As has been indicated above the issue did not arise in the House of Lords, but Lord Dunedin said that he did not think the judgment of the Court of Appeal was wrong, " but I wish it to be distinctly understood that I have not formed and do not express any opinion on the question whether the judgment of Bailhache J. on this head or the judgment of the Court of Appeal in its variation ought to be preferred."[10] Lord Atkinson, however, said that the charterers " were entitled to a reasonable time to determine how to deal with those altered conditions, and that then a reasonable time for this had not elapsed before they proceeded to substitute maize for wheat in loading."[11] The other members of the court expressed no opinion on the matter. It is interesting to observe that *Owners of the SS. Ardgowan* v. *Royal Commission on Wheat Supplies* later went to the Court of Appeal, but was remitted to the arbitrator for him to obtain further information on certain points,[12] and no further report of the case seems to be available.

Coming now to the recent *South African Dispatch Line* v. *Owners of the Panamanian Steamship Niki*,[13] there, the charterers had the right to load " lumber and/or timber and/or wood goods and/or wheat in bulk and/or lawful merchandise " in four districts in the Coos Bay/British Columbia range. They had booked a cargo of lumber for loading at Victoria, British Columbia, but shortly afterwards a strike broke out which prevented the loading of lumber at all British Columbia ports. Diplock J. held that they were not excused by the exceptions clause in the charterparty which provided: " if the cargo intended for shipment . . . cannot be . . . loaded by reason of . . . strikes," for it was only the loading of lumber which was affected by the strike. They were still bound to load an alternative cargo. His Lordship, however, considered himself bound by the decision of the Court of Appeal in the *Bunge y Born* case,[14] and said that the charterers were entitled to a reasonable time to make arrangements to obtain and make ready for

[9] At pp. 631 and 637 respectively.
[10] [1925] A.C. 799 at 808.
[11] *Ibid.*, at p. 815.
[12] (1923) 16 Ll.L.Rep. 306, 309.
[13] *Supra.*
[14] [1924] 2 K.B. 619.

loading an alternative type of cargo. In his judgment he mentioned the view of Lord Dunedin set out above, but made no reference to that of Lord Atkinson, who had expressed agreement with the decision of the Court of Appeal on this point.

The justification for allowing the charterer a reasonable time in which to make alternative arrangements is perhaps best set out in the judgment of Atkin L.J. already referred to: "The contract is made in relation to well-known business conditions, and it would be surprising to find that a shipper of a cargo who intended to ship wheat should find that he had no protection at all in the event of a sudden prohibition imposed while he was in the process of loading wheat, on the ground that he also had ready for that ship a full cargo of maize and rye, and in some cases also linseed and rapeseed." [15]

E. R. HARDY-IVAMY.

SUEZ CRISIS DOES NOT FRUSTRATE C.I.F. CONTRACT

DISPASSIONATELY, in terms of lawyers' law, one consequence of the Suez crisis in 1956 was discussed in *Tsakiroglou & Co., Ltd.* v. *Noblee Thorl G.m.b.H.*[1] The case is a useful companion to *Carapanayoti & Co., Ltd.* v. *E. T. Green, Ltd.*, noticed on a previous occasion.[2] In both cases buyers in Europe, shortly before the Suez crisis, bought commodities in the Sudan, *c.i.f.* Belfast in the earlier and Hamburg in the later case. When the time for shipment arrived the Canal, which both parties in both cases had regarded as the route for carrying the cargoes, was blocked. In both cases the sellers could have shipped the cargoes round the Cape of Good Hope, a voyage two and a half times longer and considerably more expensive than the route via Suez, but on both occasions the cargoes were not in fact shipped, in the second case after an unsuccessful attempt to obtain an extension of time from the buyers.

In both cases the buyers sued the sellers for damages. In *Green's* case they failed, but in *Noblee's* case they won. In *Green's* case McNair J., overruling the arbitrator, held that the contract was frustrated, but in *Noblee's* case Diplock J., resting his decision on the finding of the arbitration appeal board, negatived frustration. What caused this discrepancy, especially in view of Diplock J.'s insistence that he would be very reluctant to depart from what McNair J. had held? He was spared a decision on this point because he was able to distinguish the second case.

In the Note on *Green's* case some doubt was expressed whether there had been evidence of shipment round the Cape being

[15] *Ibid.*, at 637.
[1] [1959] 2 W.L.R. 179; also reported [1959] 1 All E.R. 45.
[2] 22 M.L.R. 81.

commercially different from shipment via the Canal. A passage in the argument of counsel for the buyers in *Noblee's* case, referred to in the judgment, seems to confirm that there was nc positive evidence to this effect. Nevertheless, McNair J., after referring to the dramatic consequences of a shipment round the Cape during the last war, as described in celebrated war memoirs, held that the voyage round the Cape "includes . . . a circumstance which may involve the seller in quite different obligations as to the condition of the goods on shipment from that involved in shipment via the Canal."

Positive evidence of difference was not produced in the *Noblee* case either, but the Board of Appeal, which considered the arbitrator's award, found: "The performance of the contract by shipping the goods on a vessel routed via the Cape of Good Hope was not commercially or fundamentally different from its being performed by shipping the goods on a vessel routed via the Suez Canal."

On the strength of this finding, which, after careful consideration, Diplock J. held to be a finding of fact, the learned judge came to the conclusion that the contract was not frustrated, and that the sellers were accordingly in default. Thus, two events, arising from the same cause and substantially identical, were held to have different legal consequences—a telling illustration that a civil court is not called upon to discover the absolute truth, but only the facts as presented by the parties to the dispute. It will be interesting to see whether, as a result of these two cases, a finding as that in *Noblee's* case or to the opposite effect, as the case may be, will be included in arbitrators' awards as a matter of course.

O. C. Giles.

Looking at Deleted Words

The recent case of *Louis Dreyfus et Cie* v. *Parnaso Cia, Naviera S.A.*[1] is an interesting addition to the authorities concerning the vexed question whether the court is entitled to look at words which have been deleted from a standard form of contract.

One view is that no use at all must be made of the deleted words. Thus, in *Ambatielos* v. *Anton Jurgens Margerine Works*,[2] Viscount Finlay observed[3]: "Now something has been said about the history of this charter. This charter was in a form which was in print. It was a great deal altered, words in print were struck out and words in writing were inserted; and it was said, in tracing the history of these alterations, that it made it

[1] [1959] 1 All E.R. 502; also reported [1959] 2 W.L.R. 405.
[2] [1923] A.C. 175, H.L.
[3] At p. 184.

improbable that the construction for which the respondents contend should be the true one. I think that all we have to do with is the charter as it finally stands; we must construe the clause with which we have to deal according to the form which the charter ultimately assumed. All the particulars we have may be very interesting as matter of history; I do not think they really affect the construction which ought to be put upon the charter now that we have got it."

To similar effect is *M. A. Sassoon & Sons, Ltd.* v. *International Banking Corporation*,[4] where, in relation to a letter of advice on a printed form, Viscount Sumner said[5]: "It was apparently part of the appellants' argument that the deletion of the words in the form 'you are in no way released from the ordinary liability of drawers' in combination with the added words, 'this authority is a confirmed credit,' imports that 'you are in some way released from that liability.' Their Lordships cannot accept this. There is a good deal of authority, now old, about the effect of deleting words in a printed form of mercantile contract, which it is not now necessary to cite; but they take it to be settled, in such a case as this, that the effect is the same as if the deleted words had never formed part of the print at all. The words expressly added, of course, remain to be construed."

The rule stated in this case was accepted in *Reardon Smith Line, Ltd.* v. *Central Softwood Buying Corporation, Ltd.*,[6] which concerned a charterparty, as being generally applicable. Greer L.J. said that it did not, in his view, prevent the court from looking at a clause which, though struck out, was referred to in a part of the agreement which was not struck out.

Again, in another case concerning a charterparty—*S. S. Lyderhorn Co., Ltd.* v. *Duncan Fox & Co.*[7]—Farwell L.J. said[8]: "I do not think we are entitled to look at the portions that are struck out. . . . Speaking for myself, I do not think we are entitled to treat this as distinct from a clean copy because we are supplied with the actual words which were struck out." Further, in a case concerning a contract for the sale of a ship,[9] Eve J. said that he read it "as though it were all written out afresh, and was not a composite document partly in writing and partly in print and containing some printed matter which has been struck out, but which is still legible."[10]

The contrary view, *i.e.*, that the court can look at the deleted words, is well set out in the judgment of Lord Esher M.R. in *Baumwoll Manufactur Von Scheibler* v. *Gilchrest & Co.*[11]—a case

[4] [1927] A.C. 711, P.C.
[5] At p. 721. See also *Inglis* v. *Buttery & Co.* (1878) 3 App.Cas. 552.
[6] (1932) 42 Ll.L.Rep. 284, 291.
[7] [1909] 2 K.B. 929.
[8] At p. 941.
[9] *Manchester Ship Canal Co.* v. *Horlock* [1914] 1 Ch. 453.
[10] At p. 463.
[11] [1892] 1 Q.B. 253, C.A.

concerning the liability of the owner of a chartered ship towards a bill of lading holder—where he observed [12]: "Then there is the contract contained in the charterparty. We must look at that and construe it, subject to the condition in which they stood at the time with regard to the purchase of the ship, and the intention of the parties as disclosed upon the face of it. We have a right to look at what is written into the printed form and what is struck out." Again, in *Caffin* v. *Aldridge*,[13] the Court of Appeal held that it was entitled to look at the words "full and complete," which had been deleted from the printed form of charterparty in order to ascertain the meaning of the word "cargo." Lord Esher M.R. said [14]: "It seems to me obvious on the terms of this charterparty that it did not mean here a full and complete cargo. In order to see what it meant, one must look at the rest of the document. We find that the words 'full and complete,' which were originally in the printed form, had been struck out." In *Rowland and Marwood's S.S. Co., Ltd.* v. *Wilson, Sons & Co., Ltd.*,[15] Bruce J. cited with approval the words of the Master of the Rolls in *Baumwoll Manufactur Von Scheibler* v. *Gilchrest & Co.*,[16] and said that he was entitled to take into consideration the words "loading and . . ." in a printed form of charterparty which had been struck out. Accordingly, he held that the provision with regard to dispatch money applied only to the days saved on the time allowed for discharging.

Until now, one of the most recent authorities has been *Aktiesdampskibs Heimdal* v. *Russian Wood Agency, Ltd.*,[17] where Scrutton L.J., in support of the second view, said [18]: "I am, of course, aware of the conflicting authorities as to whether you may look at clauses struck out of a printed form. I, myself, always do, and I think the comparison between the original and the altered form frequently throws great light on what the parties intended by the words they used."

In Scotland, the second view was adopted by the Court of Session in *Taylor* v. *John Lewis, Ltd.*,[19] where it was held that it was legitimate to compare the one form of charterparty with the other for the purpose of ascertaining the import of the alterations.

The courts in the United States have also adopted this view. Thus, in *One Thousand Bags of Sugar* v. *Harrison*,[20] the Circuit Court of Appeals, Third Circuit, held that it was entitled to look

[12] At p. 256.
[13] [1895] 2 Q.B. 648.
[14] At p. 650.
[15] (1897) 2 Com.Cas. 198.
[16] *Supra.*
[17] (1933) 46 Ll.L.Rep. 1.
[18] At p. 6.
[19] 1927 S.C. 891. See the judgments of Lords Hunter and Anderson at pp. 899 and 901 respectively, but *cf.* the judgment of the Lord Justice-Clerk at p. 898.
[20] (1893) 53 F. 828.

at the word "delivered," which had been struck out of the printed form of charterparty, in order to ascertain the intention of the parties as to how much freight was payable under it. A similar decision was given by the Circuit Court of Appeals, Second Circuit, in *Rosasco* v. *Pitch Pine Lumber Co.*,[21] where the printed clause which had been deleted stated " forty-eight hours allowed awaiting orders at Montevideo."

The subject is considered in the footnotes in Scrutton on *Charterparties*,[22] but it is submitted that some of the cases mentioned do not support the general propositions there cited. For instance, *Stanton* v. *Richardson* [23] was a case in which there had been no *deletion* of the words in the printed form of charterparty, but only an *omission*.[24] Again, in *Glynn* v. *Margetson*,[25] it would appear that none of the clauses in the bill of lading had been deleted; the issue in the case being whether the written words could stand with the printed words.

In the recent case *Louis Dreyfus et Cie* v. *Parnaso Cia Naviera S.A.*[26] a vessel was unable to load a complete cargo under a charterparty, and one of the questions involved was the construction of an exceptions clause. Diplock J. said that there was a " pleasant diversity of authority " on the subject of looking at words deleted in a contract to assist the court in construing the words that remained, and concluded [27]: " Where there is a standard form of words familiar to commercial men and contained in a printed form in general use, such as the Gencon charter, it seems to me unreal to suppose that when the contracting parties strike out a provision dealing with a specific matter, but retain other provisions, they intend to effect any alteration other than the exclusion of the provision struck out. I cannot prima facie, at any rate, ascribe to them any intention of altering the meaning of the words in the provisions which they have chosen to retain. I say ' prima facie ' because there may be added or substituted words which drive one to the conclusion that they did intend to ascribe to the words retained a meaning modified by the added or substituted words."

Accordingly, while his Lordship thought that he must first look at the clause in its actual form without the deleted words, if he found the clause ambiguous, he thought he was entitled to look at the deleted words to see if any assistance could be derived from them in solving the ambiguity, bearing in mind the prima facie rule that he had indicated.

E. R. Hardy-Ivamy.

[21] (1905) 138 F. 25.
[22] 16th ed., 1955, pp. 33–34.
[23] (1874) L.R. 9 C.P. 390.
[24] See the remarks of Cockburn C.J. in argument.
[25] [1892] 1 Q.B. 337; [1893] A.C. 351.
[26] [1959] 2 W.L.R. 405; [1959] 1 All E.R. 502.
[27] At p. 506.

The Right to Reject Future Goods

In *McDougall* v. *Aeromarine of Emsworth, Ltd.*[1] the defendants agreed to build a yacht for the plaintiff buyer. When the yacht was completed the buyer claimed to reject it for breach of condition and to recover back the price he had paid. Diplock J. held, on the facts and on the construction of the contract, that there had been a breach of condition. The fundamental question at issue was whether the buyer was entitled to reject the yacht.

Since a contract of this nature is a contract for the sale of goods,[2] the logical approach to the problem would be to consider section 11 (1) (*c*) of the Sale of Goods Act, 1893, which is generally considered to specify the only two occasions on which the buyer will lose the right to reject goods for breach of condition: (1) if the contract is not severable and the buyer has accepted the goods, or (2) if the contract is for specific goods, the property in which has passed to the buyer.

The first of these alternatives requires but scant consideration, since there had clearly been no acceptance by the buyer within the meaning of section 35 of the Act. The second must be analysed at greater length. "Specific goods" are defined in the Act as "goods identified and agreed upon at the time a contract of sale is made."[3] The yacht in question was undoubtedly "future goods" within the statutory definition: "goods to be manufactured or acquired by the seller after the making of the contract of sale"[4]; however, the antithesis in the Act is not between future goods and specific goods, but between future goods and existing goods.[5] Although several writers have suggested that future goods cannot be specific,[6] there seems to be no reason why goods to be acquired by the seller (one type of future goods) should not be specific goods; for example, a contract by S to sell to B a specific first edition which S proposes to buy thereafter at an auction sale.[7] Nevertheless, it is suggested that goods to be manufactured by the seller (the other type of future goods) cannot be "identified and agreed upon" at the time the contract is made since they are not then in existence, and that, therefore,

1 [1958] 1 W.L.R. 1126; [1958] 3 All E.R. 431, Q.B.D.

2 *Per* Diplock J. [1958] 1 W.L.R. at p. 1129; [1958] 3 All E.R. at p. 436.

3 Sale of Goods Act, 1893, s. 62 (1).

4 *Ibid.*, ss. 5 (1), 62 (1).

5 Defined not as goods in existence at the date of the contract but as goods "owned or possessed by the seller": s. 5 (1).

6 Benjamin on *Sale*, 8th ed., p. 322; Chalmers' *Sale of Goods Act*, 13th ed., p. 186; Schmitthoff, *The Sale of Goods*, pp. 43, 67. *Cf.* Romer J. in *Re Blyth Shipbuilding, etc., Co.* [1926] Ch. 494, 499.

7 See, for example, *Varley* v. *Whipp* [1900] 1 Q.B. 513, D.C., referred to by J. C. Smith (1951) 14 M.L.R. at p. 177. In the sale of future goods the property cannot pass to the buyer when the contract is made, for s. 18, r. 1, of the Sale of Goods Act has no application: see s. 5 (3). *Cf. Butterworth* v. *Kingsway Motors, Ltd.* [1954] 2 All E.R. 694.

irrespective of the passing of the property to the buyer, the second leg of section 11 (1) (*c*) cannot apply to such goods.

If this is so, then the result in *McDougall* v. *Aeromarine*[8] should be that the buyer is entitled to reject the goods. If he is entitled to reject the goods, then it must follow that he is entitled to the return of the price.[9]

Although Diplock J. came to this conclusion, it is perhaps surprising that he did so without considering section 11 of the Act at all. "The plaintiff's claim," he said, ". . . is a claim for money paid upon a consideration which has wholly failed.[10] In order to succeed, it is necessary for him to say that at the date of the issue of his writ he had no property in the vessel." Having approached the problem in this way, he had then to discuss the passing of the property in the yacht.

The terms of the contract apart, the relevant rule would be found in section 18, rule 5 (1) of the Act, relating to the sale of unascertained or future goods by description. But the rules in section 18 are merely rules for ascertaining the intention of the parties as to the time at which the property is to pass, and the present contract, in a form sponsored by the Ship and Boat Builders' National Federation, contained in clause 8 a provision setting out the parties' intention. Payment of the price was to be by five instalments, the first payable on signing the contract and the remaining instalments as various stages of the work were completed. Clause 8 read:

> "The said craft together with all materials equipment fittings and machinery purchased by the builders specifically for the construction thereof . . . shall become the absolute property of the purchaser upon the first instalment being paid hereunder. . . ."

"Does the presence of this clause," asked Diplock J., "divest [the buyer] of his right to reject the yacht and disclaim any property in it, if there be a breach of condition by [the builders]?"

There was no evidence that, at the date of the first payment under the contract, the construction of the yacht had been started or that at that date any goods had been purchased by the builders specifically for the construction of the yacht. The clause could not, therefore, take effect literally, for when the first instalment was paid no goods existed which could become the purchaser's property. A similar conclusion would have been arrived at had the learned judge referred to section 16 of the Act, which states that "where there is a contract for the sale of unascertained

[8] Note 1, above.

[9] *Cf.* the express provision as to repayment of the price in the American Uniform Sales Act, s. 69 (4). See too, Sale of Goods Act, 1893, s. 54.

[10] There was an alternative claim for damages for breach of contract: [1958] 1 W.L.R., at p. 1128.

goods no property in the goods is transferred to the buyer unless and until the goods are ascertained." [11]

There is a further possibility: the property in the yacht might pass to the buyer as it came into existence, so that as each accession were made it vested in the buyer. This is a familiar provision in shipbuilding contracts [12] but, held Diplock J., "it does not seem to me that on its true construction clause 8 provides for the passing to the [buyer] of the property in the craft, if it came into being after [the date of the first payment]."

Nevertheless, the learned judge continued to deal with the question on the alternative assumption that he was wrong in his interpretation of clause 8 and that it was effective to transfer to the buyer the property in the craft as production proceeded. "It does not follow," he said, "that the property therein passed to the purchaser indefeasibly. It is not an unfamiliar conception in contracts for the sale of goods that the property should pass defeasibly. . . ." [13] I do not think that a clause providing for the transfer of property, whether qualified by the adjective 'absolute' or not, . . . [14] of itself irrevocably deprives the buyer of any right to reject the goods . . . , and to divest himself of his property therein."

It is indeed "not an unfamiliar conception," for this is surely what happens in most sales of unascertained goods. The property in unascertained goods frequently passes to the buyer, in accordance with section 18, rule 5 (1), when the goods are unconditionally appropriated to the contract, and usually this occurs when the seller delivers the goods to the buyer or to a carrier.[15] But the buyer does not lose his right to reject the goods until acceptance in accordance with section 35 of the Act,[16] notwithstanding the

[11] The rule in s. 17 that the property passes when the parties so intend applies in terms only to a contract for the sale of specific or ascertained goods. Despite s. 55 of the Act, it is probably not possible to vary the rule in s. 16 by agreement: see Williston, "Delivery as a Requisite in the Sale of Chattel Property" (1922) 35 H.L.R. 797, pp. 807 *et seq.*; Kruse, "What Does 'Transfer of Property' Mean with Regard to Chattels?" (1958) 7 Am.Jnl. of Comp. Law 500, pp. 505–506.

[12] For example, *Wood* v. *Bell* (1856) 5 El. & Bl. 772, 6 El. & Bl. 355, Ex.Cham.; *Seath* v. *Moore* (1886) 11 App.Cas. 350, H.L.; *Reid* v. *Macbeth* [1904] A.C. 223, H.L.; *Re Blyth Shipbuilding and Dry Docks Co., Ltd.* [1926] Ch. 494, C.A. All these cases involved disputes between the buyers and the sellers' trustees or creditors in the sellers' insolvency; *a fortiori* similar principles should apply as between buyer and seller.

[13] Citing *Colonial Insurance Co. of N.Z.* v. *Adelaide Marine Insurance Co.* (1886) 12 App.Cas. 128, P.C., and *Nelson* v. *William Chalmers & Co.*, 1913 S.C. 441 (Ct. of Sess.). See also *Kwei Tek Chao* v. *British Traders & Shippers, Ltd.* [1954] 2 Q.B. 459, 487, where Devlin J. refers to the buyer obtaining a "conditional property" in the goods.

[14] I have omitted the words "in incomplete goods or their components" in the belief that Diplock J.'s remarks apply equally to the transfer of property in complete goods.

[15] s. 18, r. 5 (2). Unless, perhaps, the goods are not in a deliverable state: *cf.* Atiyah (1956) 19 M.L.R. 315.

[16] s. 11 (1) (*c*), referred to above. *Cf. Delaware, Lackawanna & Western Railroad Co.* v. *U.S.* (1913) 231 U.S. 363, 372–373 (U.S.Sup.Ct.).

passing of the property, and where he does exercise his right to reject it is clear that the property revests in the seller. Thus, in *Head* v. *Tattersall*,[17] where the buyer was able to recover the price paid on rejecting the goods for breach of condition, Cleasby B. said: ". . . the effect of the contract was to vest the property in the buyer subject to a right of rescission in a particular event, when it would revest in the seller."

The truth is that it was unnecessary to consider the question of the passing of the property in the instant case. Once it is found that the buyer is entitled to reject the goods, his right to the return of the price must follow, or else the right of rejection is illusory. As Buller J. said in *Towers* v. *Barrett*[18]: "If the contract be rescinded . . . the plaintiff is entitled to recover back his whole money; and then an action for money had and received will lie."

AUBREY L. DIAMOND.

COMPANY LAW—OPPOSING OPPRESSION

HARD on the heels of *Scottish Co-operative Wholesale Society* v. *Meyer*[1] comes the decision of the Court of Appeal in *Re H. R. Harmer, Ltd.*[2] This affirms the decision of Roxburgh J. granting relief under section 210 of the Companies Act, 1948, which provides shareholders with a novel remedy against oppression. This is the first reported[3] case in England of a successful application under this section, and it and *Meyer's* case refute the view expressed by the Northern Ireland Committee on Company Law Amendment,[4] that the section "has been so framed that it has largely missed the mark and has been found to be practically useless"[5]—a view to which most English practitioners would never have subscribed.

The facts in *Re Harmer* were very different from those in the *Meyer* case, but present in an exaggerated form a not unusual situation. The founder of the firm, having converted it into a private company, gave his two sons the great majority of the equity shares, but he and his wife retained the voting shares. The father and the sons were appointed life directors but, in fact, the father continued to run the company as if it were his own, and to ride rough-shod over the decisions of the board. This

[17] (1871) L.R. 7 Ex. 7, at p. 14. See, too, *Hardy & Co.* v. *Hillerns & Fowler* [1923] 2 K.B. 490, C.A., *per* Bankes L.J. at p. 496, Atkin L.J. at p. 499.
[18] (1786) 1 T.R. 133, K.B., at p. 136.
[1] [1958] 3 W.L.R. 404; [1958] 3 All E.R. 66, H.L.(Sc.), noted in (1958) 21 M.L.R. 653.
[2] [1959] 1 W.L.R. 62. C.A.; also reported in [1958] 3 All E.R. 689.
[3] It is understood that there was a successful, unreported, application earlier in 1958.
[4] Cmd. 393; noted at p. 304, *supra*.
[5] *Ibid.*, para. 12. But the committee's criticism of the wording of the section has great force.

autocratic disregard of constitutional proprieties, which had inflicted harm on the company and its reputation, was held to entitle the sons (an oppressed majority rather than minority) to relief, depriving the father of any voice in the future management of the company's affairs.

Ever since the House of Lords gave benediction to the one-man private company in *Salomon* v. *Salomon & Co.*,[6] it has been not uncommon for family business men to think that, notwithstanding incorporation of the business, they may carry on much as they please. Indeed, provided they act in a constitutional manner (unlike Harmer senior), there is little to stop them even now. As Romer L.J. has said[7]: "For a petition to succeed it must be shown that there has been oppression in a real sense of members *qua* shareholders, and not merely a subordination of their wishes to the power of a voting majority." If a holder of the majority of the voting rights chooses to pack the board with voters on whom he could rely, then there can be no complaint so long as the power of appointing directors is, within broad limits, exercised "for the benefit of the company as a whole and not to secure some ulterior advantage."[8] He will be well advised not to reveal the true motive for his appointments, however, for as Jenkins L.J. suggests, if he claims to have appointed A rather than B because A will always vote as he is told, the appointer is "infringing on dangerous ground."[8]

Re Antigen Laboratories, Ltd.[9] held that an oppressed petitioner under section 210 has to specify the kind of relief he seeks, but, in fact, in *Harmer's* case the relief applied for was not that actually given. Roxburgh J., in an order with which the Court of Appeal in no way interfered, imposed (with the consent of the petitioners) a solution of his own, thus giving some effect to the liberal spirit in which the Cohen Committee[10] evidently thought that the section ought to be interpreted.

Elder v. *Elder and Watson*,[11] a case in which section 210 was unsuccessfully invoked, established that a member seeking relief must be oppressed in his position as a member, and suggested that oppression in this type of case was a departure from fair dealing and fair play. Viscount Simonds, in the *Scottish Co-operative Wholesale Society* case, turned to the dictionary for a rather better definition of oppression as "conduct which is burdensome, harsh and wrongful." Jenkins L.J., whilst adopting that definition, has further analysed the concept of oppression in a very enlightening judgment. It is clear, in his view, that oppression

[6] [1897] A.C. 22 (H.L.).
[7] [1959] 1 W.L.R., at p. 87.
[8] *Ibid.*, at p. 82.
[9] [1951] 1 All E.R. 110.
[10] Cmd. 6659, para. 60.
[11] 1952 S.C. 49.

by those exercising *de facto* control is just as much oppression for the purposes of the section as would be oppression by persons exercising *de jure* control. It is clear that there must be prima facie a continuing process of oppression; an isolated act would probably not ground a petition. Jenkins L.J. did not see any reason for holding that section 210 was necessarily confined to cases of discrimination between members, nor did he think it was essential that the alleged oppressor was oppressing in order to obtain pecuniary benefit. He appreciated that the love of money is not the root of all evil. The love of power can be a very strong motive for behaviour.

Harmer's case is yet another illustration of the curious results which follow when control of the company is taken away from those who have the majority beneficial interests, an increasingly common state of affairs. It is also an example of another somewhat undesirable feature of modern company practice.

Of recent years there has been a remarkable increase in the number of different species of directors, which company law draftsmen have introduced into memoranda and articles. These include life directors, executive directors, special directors and governing directors, none of whom is recognised as having powers outside those specifically conferred by the articles, and some of whom may not even be regarded as "directors" at all for legal purposes. In *Harmer's* case itself, the father had been appointed governing director on incorporation, without any special powers or duties whatever. Roxburgh J., wishing to place him in a position where he could not interfere in the company, ordered that he should be engaged as a consultant only, but given the consolation of being named "president" for life, such office to confer no duties, rights or powers. While it may be commendable to get away from the adjectival director, the use of the Americanism "president" seems unfortunate in the case of a company with an American clientele. To American customers it may suggest that the father is the chief executive officer in the company—which is precisely what he is not.

Peter Ford

REVIEWS

THE SANCTITY OF LIFE AND THE CRIMINAL LAW. By GLANVILLE WILLIAMS. [London: Faber and Faber, Ltd. 1958. 319 pp. 30s. net.]

"THOU shalt not kill" says the sixth Commandment; God has given life to man, therefore it is for Him, in the traditional Christian view, and for Him alone, to take it away again. The State, for its own purposes, agrees in holding life sacrosanct. Since it is the first aim of organised society to safeguard the security and integrity of human life, any wilful interference with its natural course tends to be visited with the full rigour of the law. Murder is the crime of crimes.

Yet there are certain borderline categories where it can be argued that, so far from endangering public security and peace, deliberate manipulation of the natural progress of man from birth to death would actually benefit the physical and mental health and even the social stability of the community as a whole. It is over these matters that the scientist, especially the medical profession, is likely to differ increasingly from the theologian and the moralist, while the law, if it takes too unyielding a stand by the side of the latter, may find itself accused of defending an abstract moral principle without any demonstrable social necessity or justification.

In his courageous new book *The Sanctity of Life and the Criminal Law*, which has grown out of lectures delivered in the United States two years ago, Dr. Glanville Williams addresses himself to some of these liminal problems of law and morals and suggests that, in many respects, the legal position lags far and even dangerously behind modern needs. In certain instances the growth of legal fictions has enabled the courts to escape from the most harsh and cruel results which might flow from strict application of the common law: the crime of attempted suicide and infanticide are both instances where even statutory recognition is now given to the presumption of a "temporary disturbance" of the mind of the accused. In other fields the bark of the law is far worse than its bite. Take abortion. At present both English law and the great majority of the U.S. jurisdictions regard any interference with pregnancy, however early it may take place, as criminal unless for therapeutic reasons. Theoretically the mother consenting to an operation of this kind can be sentenced to imprisonment for life, but in practice she is hardly ever prosecuted at all. What is more, there are methods of inducing abortion and of terminating pregnancy which can be practised, at least at an early stage, without fear of discovery (though not without grave danger to health) through drugs, so that it is impossible to gainsay the fact that the law of abortion as it stands is ineffective for all its severity. Euthanasia is murder in the eyes of the law, but, as a recent *cause célèbre* has demonstrated, equally difficult to establish and prove at least when administered by a medical practitioner who can, in any event, cut life short by no more than an act of omission.

Dr. Glanville Williams examines with great care and fair-mindedness the present law and the movement of theological teaching and secular thought which has led up to it. In the end, his analysis of the wider issues raised by the matters just referred to—infanticide and suicide, induced abortion and voluntary euthanasia (which fill the major portion of his book)—leads him to put forward, unequivocally, the view that the law, by prescribing what it cannot, and often, in the light of new medical and sociological knowledge,

ought not to attempt to enforce, is doing more harm than good. Some of his arguments are moral, as when he writes:

> "I am not clear in my own mind that this general opinion . . . of the sanctity of life justifies the punishment of a mother who, finding that she has given birth to a viable monster or an idiot child, kills it. I venture to doubt whether society has a right to stand in judgment upon a mother placed in this terrible predicament. . . . And where this certainty is lacking," he asks, "should not liberty prevail?"

Equally forceful, if not more so, are his arguments drawn from the practical working of our criminal law. One result of the present law of abortion, for instance, is to lead a very considerable number of women each year to seek the help of back-street abortionists, because they cannot obtain the help of qualified medical practitioners and hospitals who could perform the operation with far less danger to health, or none at all. A way to solve this vexed problem, Dr. Glanville Williams proposes, would be to postpone the pre-natal date at which the foetus or embryo begins to enjoy the protection of the law to, say, the moment of "quickening" or the time of recognised "viability," so excluding the early months of pregnancy. Even short of such a radical change in the law (which is hardly to be expected in the present state of opinion), the author offers certain partial solutions which would extend the medico-legal indications for operational termination of pregnancy, though he seems to think that there is little chance that this might come about without the need for legislation. In this connection the author gives a most helpful, detailed exposition of the experience gained with limited legalisation of induced abortion in the Scandinavian countries. Again, in voluntary euthanasia, the distinction now generally drawn between what Dr. Glanville Williams calls "shortening life and accelerating death," or in other terms "prolongation of life and the unnecessary prolongation of the act of dying," appears to him as devoid of logic, vague and therefore likely to put the medical practitioner in an unfortunate dilemma between the welfare of his patient and the risk of possible prosecution.

Even in suchlike matters of life and death the discretionary power of the prosecuting authorities to refrain from initiating proceedings and the discretion of the courts to discharge without punishment where this appears to be expedient or where there are sufficiently weighty arguments in mitigation can be, and are, of course, used with benefit to avoid unduly harsh operation of the law. But it is plainly Dr. Williams' opinion that this is not enough and that legislation to liberalise the law is urgently required. For this purpose he draws up detailed proposals for reform, though he is not over-sanguine that, given the present confused state of public opinion, much progress in legislation on these highly controversial subjects is likely to be made in the near future, the less so since law reform has more than once of late turned out to be political dynamite.

Still, there is a possibility that sound population policy may in the long run impose the need for more far-reaching action than the vast majority of lawyers and churchmen would at present be willing even to think of. Just here and there, as when he speaks of involuntary euthanasia ("for example in the course of senile dementia"), and when he regrets in the chapters devoted to sterilisation, birth-control and artificial insemination, the "eugenic egalitarianism" which he sees "current" in this country as in the United States, Dr. Glanville Williams hints at what might be in store once one were to accept, with absolute consistency, the demand to separate the criminal law completely from the theological tenets designed to uphold the sanctity of life. If it is true, as is now a widely held view based on sociological studies, that a very large proportion of crime of every kind committed in modern society is due to the sub-normal and mentally defective, and to a comparatively very small and often highly localised section of the poorest among the proletariat, Dr. Glanville Williams' complaint (in connection with his

discussion of birth-control and family limitation) that "tomorrow's citizens are produced and brought up in disproportionate numbers by the under-educated and poverty-stricken groups" assumes particular significance. Does not the criminal law perhaps defeat its own ends? Does not the prevention of publicity for contraceptives, the prohibition of eugenic sterilisation and abortion tend to increase the number of unwanted or physically and mentally defective or handicapped children? Does not the law against infanticide, suicide and mercy killing keep alive some of those least capable of looking after themselves? So looked at the remedy must seem obvious and simple to the out-and-out utilitarian.

Be it said at once that it does not to Dr. Glanville Williams, who is well aware of the complexity of the issues raised. The object of his lucid and searching book is not to serve the planning of an inhuman State, but on the contrary to pave the way for a more humane approach to vital problems besetting the individual by a re-examination of the traditional attitude of theology, morals and the law in the light of increased knowledge and changing public opinion.

H. A. HAMMELMANN.

THE DANISH CRIMINAL CODE, With an Introduction by DR. KNUD WAABEN, Professor A.I. in the University of Copenhagen. [Copenhagen: G.E.C. Gad-Publishers. 1958. 119 pp. D.cr.20.]

THE Danish Committee on Comparative Law thought it would be useful to have the Danish Criminal Code translated into English. Translations into French and German already existed. Miss Else Giersing has done the translation, with some supervision and advice from Dr. M. Grünhut, Reader in Criminology at Oxford. Dr. Knud Waaben, Professor A.I. in Criminal Law in the University of Copenhagen, has contributed a short introduction to the Code, and the whole book is admirably produced, and printed in clear type which makes it easy to read.

The Danish Criminal Code which came into force on January 1, 1933, replaced the Criminal Code of 1866, which had long proved inadequate. The new Code was not achieved overnight—the preparatory work began as long ago as 1905, and continued throughout the intervening years. As Professor Waaben remarks in his Introduction, "it can fairly be claimed . . . that a most thorough juridical preparation preceded the new Act of 1930."

In form the Code is drawn up on the lines usually followed in Continental Criminal Codes. There is a General Part, dealing with the general principles of liability, attempts, complicity, and the system of punishments and other measures, followed by a Special Part, which defines the particular crimes. The latter, however, covers only a selection of all offences punishable under Danish law, corresponding broadly with the field covered in English law by indictable offences. Most petty offences, particularly those created in recent years for the regulation of commerce, road traffic, public health, customs duties, taxation and the like, are dealt with by other acts.

In this Special Part, Chapter XXVIII, concerned with Acquisitive Offences, *i.e.*, all offences against property which are characterised by a wilful and unlawful transfer of property, merits our attention in view of the recent decision to refer the subject of larceny and kindred offences in English law to the new Criminal Law Revision Committee. We are informed that the description of these acquisitive offences is on the whole much simplified, as compared with the Criminal Code of 1866, but to a reader convinced of the futility of distinguishing between larceny and obtaining by false pretences or other means of fraud, the discovery that this distinction is maintained in Danish law is somewhat disappointing. One wonders too whether the word

embezzlement is the most suitable word to use to describe the offence in section 278, which is defined in terms wide enough to include what we call fraudulent conversion. One notices with interest that the maximum penalty for simple cases of stealing and obtaining by fraud is two years' imprisonment, though if the offence is of an aggravated nature or there is recidivism, higher penalties may apply.

Another focus of interest at the present time is the age of criminal responsibility. The minimum age is fixed by Danish law at 15 years, and child welfare authorities deal with all offenders below that age. With regard to the age group 15–18 years, a charge is brought in relatively few cases: the Public Prosecutor will generally withdraw such a charge in pursuance of section 30 of the Criminal Code, provided the authorities responsible for children's welfare are prepared to exercise supervision over the offender or place him in a special institution. This is similar to the system in operation in Sweden and Norway. Whether it should be imitated here when we have developed our own indigenous solution, the Juvenile Court—which is widely admired although admittedly involving shortcomings—is a question which will be one of the major and most difficult questions which the Ingleby Committee will have to decide.

Those interested in comparing our measures for dealing with the offender with those employed in Denmark will find much that is intriguing in Chapter VI on Penalties. It will be observed that the English Borstal system has been imitated in the Danish institutions for young offenders between 15 and 21 years of age.

The provisions governing the test of insanity (section 16) draw a clear distinction between the medical question and the legal question of responsibility, which is similar to that which our English courts have painfully spelled out, at the cost of a good deal of misunderstanding. Mental deficiency and psychopathy are provided for by section 17, which refers to any person whose "more permanent condition involved defective development, or impairment or disturbance of his mental faculties, including sexual abnormality," and says that the court shall decide, on the basis of a medical report and all other available evidence, whether the person concerned "may be considered susceptible to punishment." This appears to be placing the boot on the other foot compared with the present proposal in our own Mental Health Bill, whereby a psychopath may be exempted from criminal responsibility if he "requires or is susceptible to medical treatment": Clause 4 (4). Denmark has one of the most famous special institutions for psychopaths, and persons exempted from punishment under section 17 may be detained in such an institution under section 70 (1). Professor Waaben explains in his commentary that "on the whole . . . the courts have made extensive use of section 17 and thus avoided the application of penalties which would be inappropriate to psychically abnormal persons." In England we have no separate institution for psychopathic offenders, and it is a mistake to suppose that the new psychiatric prison-hospital at Grendon Underwood, which will be ready by 1962, will be able to cope with more than a handful of such persons. Whether we shall ever get to the point of setting up a special institution for such offenders is a moot point—there are strong arguments both for and against such a development.

The provisions in Denmark for dealing with persistent criminals who are not particularly dangerous, which enable such persons to be sentenced to the workhouse for from one to five years, provide food for thought for the English reader. Many cases of persistent thieving and habitual drunkenness are dealt with in this way. In addition there is the sentence of preventive detention, which is used more rarely in Denmark than in the United Kingdom. The criminal tendencies of the accused must have been clearly shown through a number of previous sentences of imprisonment. The minimum period of

detention is four years, and there is no maximum, but the average term of detention has been some seven years.

Instead of probation, the Danish Criminal Code provides for the suspended sentence, and about one-third of all cases result in such a disposition. Provision is made for the suspended sentence to be subject to various conditions which include supervision, and great importance is attached to pre-sentence social investigations under section 56 (2). Both supervision and pre-sentence investigation are usually carried out by the Danish Welfare Society, a private organisation which receives State subsidies.

Finally, the question whether the Code, which is now over 25 years old, needs revision is discussed by Professor Waaben. Apparently there has been little need to question its provisions, save in the realm of offences against the State, where revisions were made in 1952. But in 1950 a permanent Criminal Law Commission, presided over by Professor Stephan Hurwitz, was charged with considering and making recommendations on a partial reform of the Criminal Code. One of the recommendations has been the development of the system of suspended sentences along lines which. if accepted, may well result in a system very much like the English system of probation.

In its penal provisions, the Code is essentially an example of conservative progress. The thought expressed by Professor Waaben, at page 10, appears to have inspired much of the developments, and should be brought to the attention of every sitting of a criminal court:

> The deterrent effect of the penalties involving deprivation of liberty is an essential factor, but its importance should not be overestimated. The fact that punishment is to some extent replaced by other measures or that the classical features of imprisonment are blotted out implies no weakening in the fight against crime. On the contrary, the offender is more likely to abstain from further criminal activities if the measure applied bears some relation to his own personality.

We must be exceedingly grateful to the Danish Committee on Comparative Law for enabling these words of wisdom and the laws which are here reproduced to be made available to us in this translation.

J. E. Hall Williams.

Introduction to the Law of Property. By F. H. Lawson, Professor of Comparative Law in the University of Oxford. [Oxford: Clarendon Press. 1958. xii and 200 pp. 15s.]

This is the first volume to appear in the new *Clarendon Law Series*, under the General Editorship of Professor H. L. A. Hart. The object of the series is to provide "general introductions to different fields of law and jurisprudence designed not only for the law student but for the student of history, philosophy, or the social sciences, as well as for the general reader interested in some aspect of the law." Professor Lawson has boldly tackled what is generally regarded as the most technical and confusing branch of English law, has portrayed it as a whole, "eschewing the familiar divisions into real and personal property" and, in 200 pages, has produced an account which "for the most part neglects history and employs a mixed analytical and functional method."

The result is a most stimulating, learned, and deeply perceptive book. Unfortunately, Professor Lawson will regard that as a back-handed compliment. He believes his book to be "an explanatory, and not a learned book" and one suitable for a beginner and the inquiring layman. That is his opinion and he may be right. But it is not mine. I think that this is an ideal book for professors, for advanced students and for first-class students in their second or third year, but one which is too difficult for the average beginner.

If Professor Lawson's beginners can take it, they must be very much better than mine (it could well be) and his lay acquaintances must move on a much higher intellectual plane than mine (I expect they do). The fact is, as I see it, that Professor Lawson has attempted the impossible. In failing to achieve it, as I think he has, he has achieved something no less worthy: a major contribution to the literature of jurisprudence and property law.

In saying that his task was impossible, I do not wish to suggest that an introduction to the law cannot be written in a manner intelligible to beginners and laymen, but merely that such an introduction to the whole of property law cannot be written in 200 pages. And it has proved extraordinarily difficult to write a really simple introduction to any branch of law. In fact, no Englishman since Blackstone has yet been wholly successful.[1] How many of the Hamlyn Lectures have been intelligible to the "common people of the United Kingdom"? Books on legal organisation (like Jackson's *Machinery of Justice in England*, or Archer's *The Queen's Courts*) have succeeded admirably. But where is their equivalent on law itself? The least unsuccessful have been written by foreigners.

Why is this? Mainly, I think, because the whole training of an English lawyer disqualifies him from seeing law in broad perspective and renders him acutely reluctant to indulge in generalisations. Professor Lawson will dispute this; at p. 60 he says that "lawyers . . . feel a strong desire to generalise." Surely that is quite wrong? We hate generalising. That is why, on the whole, lawyers show up so badly on Brains Trusts where superficial generalisations are the order of the day. There are, of course, exceptions to this. Some lawyers, comparative lawyers especially, are masterly generalisers and Professor Lawson is foremost among them. But he cannot be superficial and if one is to be intelligible to the beginner one must not be afraid to be superficial. In his Preface he says of his book that "if it were more pretentious, I might even say that it attempts to present something of a philosophy of the subject." This is too modest; it does present the philosophy. But like most works on philosophy it is not easy reading. Only very few people, like the late Dr. Joad (incidentally the perfect Brains Truster), have the ability to write introductory books on philosophy that are readily intelligible to the tyro. Professor Lawson is a Russell rather than a Joad. We need our Joads as well as our Russells, and for this series Professor Hart is going to need several. Where will he find them?

As I have already indicated, Professor Lawson's book is a brilliant one which no advanced student can afford to ignore and which probably no one else could have written. Never before have the various strands which go to make up our law of real and personal property been pulled together in quite this way. Never before has it been brought out quite so clearly how movables and immovables have to be looked at both as component parts of funds and as individual objects; how, when regarded in the former light, there is a body of doctrine common to both; and how, even when regarded as individual objects, there is more in common between them than we are apt to realise. As he says, "it is now time for a complete reconsideration of property law as a teaching subject, and I hope this little book may lead the way." It well may.

My major criticism would be that Professor Lawson does not perhaps lay sufficient emphasis on the type of property most typical of this century—stocks and shares. Indeed, I felt that greater use of company law might have been made to illustrate many of his propositions. For example, what better illustration could be found of the distinction between management and enjoyment which he rightly emphasises at pp. 77–79? And are not Unit Trusts the ultimate example of the trend of property from objects to funds? I also felt that he displays prejudice in his remarks about taxation (though it is something to find an Oxford law don recognising its importance). "Property

[1] The broadcast talks of Mr. Dudley Perkins suggest that he might succeed.

lawyers," he says (at p. 110), "do not have to face this mass of repulsive detail." Well, the details of tax law may be repulsive to Professor Lawson but a lot of people find the details of property law quite as repulsive. And it just is not true to say, as he does (*ibid.*), that the reason why the question of what is income is not simple is "largely because Parliament has had to check in detail devious ways of disguising income as capital gain." It is perfectly true that Parliament has had to say that certain gains shall be taxed as if they were income, but Parliament has not done this by tampering with the definition of income and, indeed, has never attempted a definition to tamper with. Definition has been left entirely to the judges and if they have made a repulsive mess of it, this is not the fault of income tax legislation. In fact, if Professor Lawson reads [1957] British Tax Rev., pp. 310–336, he may conclude that the judicial definition of income is not quite such a mass of repulsive detail as he thinks.

These, however, are small points of balance. I learnt a lot from this book and admire it enormously. If I found it difficult, that is probably because of my own deficiencies. The more widely it is read the better, for no one who professes to be a property lawyer can afford to ignore it. The Clarendon Press have, as always, produced it admirably (though I wished the pages were slightly less crowded) and at a remarkably modest price.

L. C. B. G.

THE LAW OF WILLS. By S. J. BAILEY, M.A., LL.M., Barrister-at-Law, Rouse Ball Professor in the University of Cambridge. Fifth edition. [London: Sir Isaac Pitman and Sons, Ltd. 1957. lii and 306 and (index) 24 pp. 50s.]

THE merits of Bailey are too well known to need elaboration. The book manages to make a dry subject interesting, and the fullness of citation and illustration greatly helps comprehension of some of the finer rules. The result is that what purports to be an introductory book is remarkably full and comprehensive for its size. There are of course minor matters upon which one would argue. *Re Priest* [1944] Ch. 58 might well be also referred to on p. 79 as a useful contrast bringing out the point of *Re Limond* [1915] 2 Ch. 240. The passage on undue influence might well be expanded, since there are substantial differences here from the general run of law which are not always readily grasped by students. It does not appear from the Reports that Charter *père* was in fact in the habit of referring to Charles Charter as "Forster," as stated on p. 186, a matter which could affect substantially the impression left on the reader who was content with the summary. Such matters are, however, minor, and depend, perhaps, upon personal interests and inclinations. Of the edition as a whole it must be said that it has been well brought up to date by the inclusion of recent cases and the like. The latest material is there for the serious student.

There is, however, one major matter which should be raised now that the book is so well set (and deservedly so) upon its career. Costs of printing and of resetting pages are high, and one must welcome efforts to minimise the costs of law textbooks. Yet, when that is admitted, it seems that perhaps the stage has now been reached with Bailey when other interests ought to predominate. It is, for example, a pity that the discussion of Part I of the Intestates' Estates Act, 1952, should still be relegated to an Appendix rather than covered in the relevant part of the text. There are moments too when one feels that, for a book with the purposes of the present one, too much may now be found in the footnotes. Sometimes there is much useful argument there found which would gain weight by being in the text. At other times recent cases are cited which perhaps affect the primary text more than the

reader might suspect, or which are worth greater discussion. (The notes, though, increasingly refer the reader to periodical literature and this is a welcome development.) From the point of view of the reader coming to the book for the first time there could perhaps also be point in seeing whether some of the variations in type could not also be avoided—the insertion of asides or warnings prefaced by the word *Note* for example has a distracting effect, and on occasion could result in the reader getting the wrong emphasis. This matter strikes one all the more because of the general feeling of smoothness and pleasure which one gets from reading the text.

Bailey is so useful that one may be over-anxious in seeking blemishes. It is because of respect and affection for the book rather than in any spirit of derogatory criticism that one would suggest that in the next edition its youth might be even more fully renewed.

J. D. B. MITCHELL.

THE SURVIVAL OF GENERAL AVERAGE. By KNUT S. SELMER. [Oslo: at the University Press. London: Sir Isaac Pitman & Sons, Ltd. 1958. 312 pp. (with index). 30s. net.]

THE doctrine of general average is one of the most interesting institutions in the whole range of maritime law. It arose, and was developed, in the Mediterranean in classical times and seems to have sprung from that moral predilection for equitable conduct in the affairs of business and human life generally which has played such an important and wholesome part in the development of the law. Not that it would appear to have been in any way due to the enthusiasm or ingenuity of lawyers, for as far as we know it was the creation of shipowners and merchants. But the lawyers accepted it and gave it a legal framework, at any rate from the time of Justinian who dealt with it in Book 14, title 2 of the Digest, *le lege rhodia de jactu.*

In modern times the doctrine was the first commercial-legal institution to be brought within the compass of an effective international convention which was done in 1890 by means of the well-known York-Antwerp Rules after much travail commencing at York as early as 1860. It has been the subject-matter of a substantial literature and of many decisions in the courts of the maritime countries. Yet for a hundred years there has been an important body of opinion which has held that the development of marine insurance has made the doctrine not only otiose but positively undesirable, since it now leads to a great deal of quite unnecessary litigation between the various insurance companies which have issued policies covering the casualties giving rise to general average acts.

It is this latter point which Mr. Selmer is principally concerned to argue in this volume, and he does so with great ability, putting forward a case which it is difficult if not impossible to answer.

This is of course a highly technical matter mainly of interest to maritime lawyers and insurance men, though it should make an appeal to economists concerned with the orderly management of business affairs. The chief value of the book to the less specialised reader is to be found in the substantial historical introduction in which the development of the law of general average is traced in some little detail.

The fact that such interesting and useful books substantially on English maritime law written in competent English should be published in Scandinavia is very much to the credit of the Scandinavian lawyers concerned, though it may perhaps rouse a sense of shame in their English opposite numbers.

C.

Die faktischen Vertragsverhältnisse als Ausdruck der gewandelten sozialen Funktion der Rechtsinstitute des Privatrechts. By Spiros Simitis. [Frankfurt a.M.: Vittorio Klostermann. 1957. xvi and 619 pp. DM. 44.]

The inadequacy of the traditional idea of a contract as an expression of the will of individual parties in the face of the modern growth of standard contracts has led the courts of many countries to rely on a hypothetical, rather than on the actual, intention of the parties. The result of a given case may be attributed to the will of the parties, but in truth it is not the intention of the parties but their conduct which is decisive. These developments have produced a new concept, described in France as "relation de fait para-contractuelle," in Italy as "rapporti di fatto in materia contrattuale," in Spain and South America as "relaciones de hecho" and in Germany as "faktische Vertragsverhältnisse." Into this category fall cases known in the United States as "corporation by estoppel" and "de facto corporation," or the cases, discussed some time ago by Dr. Glanville Williams, of obligations which are void and yet capable of giving rise to claims for damages. The problem also arises where the parties, so far from intending to contract, did not even contemplate contractual relations, as in the case of the husband held liable for contracts made by the deserted wife and other cases of agency of necessity; or the doctrine of "holding out," which creates the liability of the husband for contracts of household necessaries, and which is also expressed in section 14 of the Partnership Act, 1890. As a final illustration a decision of the German Federal Court may be cited where it was held that a motorist must be deemed to have entered into a contract by leaving his car at a guarded car park even though at the time he had specifically and repeatedly stated that he did not wish to make a contract.

These cases demonstrate the growing influence exercised by considerations of collective policy in the realm of private law in proportion to the degree of importance attached by society to the relationship in question. The subject therefore offers many opportunities for a study of the changing function of contract and it is this task to which the author of the present work has addressed himself with a high degree of concentration and thoroughness. His reading has been wide and he has used his material intelligently although at times he does repeat himself and does elaborate his points at too great length. As a Greek who has studied in Germany it has been natural for him to adopt a comparative approach, and as an adherent of the sociological school he has sought to investigate the social background of legal institutions. He maintains a distinction between the form of a legal institution, which he finds in the state of the law as crystallised at any given moment, and the content of an institution which results from the dynamic pressure of social forces. This dialectical tension does not, however, offer any criteria of value and the problem of how to translate fact into norm, and, indeed, other questions of broad principle, are frequently left at large by the author.

He deals in detail with associations, leases, employments, which exist in fact without any formal contract. He insists logically that as these factual relations arise independently of the will of the parties expressed in contracts they should not be regulated by the law of contract which is designed to give effect to the intention of the parties. Instead of considering these situations as exceptional he offers a systematic theory which will also cover any transaction defective for reasons other than immorality or illegality which alone should render the transaction absolutely void.

Even if many questions of principle are left unanswered and even if some other points are treated in a rather sweeping manner, the present work is stimulating and displays throughout a desire to explain the law as something which is not timeless and immutable but capable of adaptation to the changing needs of social life. For this reason it should appeal even to those

who are not prepared to go so far as the author in describing an expression of the will of the parties as no more than one of the "possible basis of a contract among other objective factual situations," a statement which would reverse the development from status to contract.

W. Müller-Freienfels.

An Introduction to American Administrative Law. By Bernard Schwartz, Professor of Law and Director of the Institute of Comparative Law, New York University. [London: Sir Isaac Pitman & Sons, Ltd. New York: Oceana Publications, Inc. 1958. xv and 260 pp. 50s. net.]

Professor Schwartz's new book is a bigger and better version of his *American Administrative Law* (reviewed 18 M.L.R. 95) and is undoubtedly the best short introduction to the subject for the English reader. Like its predecessor, it is concerned mainly with delegated legislation, administrative adjudication and judicial review, but new chapters on Tort Liability and Estoppel and Privilege have been added. The author's frequent comparisons between American and English doctrines and institutional devices leave England as a poor second. If the Tribunals and Inquiries Act, 1958, had been passed or the Ministry of Housing and Local Government Circular No. 9/58 had been issued before he had completed the book his criticisms would no doubt have been modified. But his English readers will take note of his exposition of the relatively liberal American rules governing disclosure of State secrets and other official information in judicial proceedings, and they will be interested to read how in 1954 the New York Court of Appeals (in contrast to the Divisional Court of the Queen's Bench Division in *Parker's Case* [1953] 1 W.L.R. 1150) held that the revocation of a taxi-cab driver's licence was a judicial act requiring prior notice and opportunity to be heard.

The chief merit of the book is its lucidity. Its most obvious defect is its tendency to assimilate the rules of American and English case law (particularly by the use of the overworked adjective "Anglo-American") when material differences exist between them. At one point this has led the author into making the unsound generalisation that the "English law of [judicial] review is grounded almost entirely upon the distinction between 'law' and 'fact'" (p. 183). In English administrative law this distinction is, indeed, important; and it has become still more important now that section 9 of the Tribunals and Inquiries Act and the First Schedule thereto have made provision for appeals to the High Court on points of law from a number of additional statutory tribunals. The distinction is relevant (i) where a right of appeal is limited to questions of law, (ii) where an application is made for certiorari to quash for error on the face of the record, and (iii) where an error is alleged to go to the jurisdiction of a tribunal, inasmuch as errors of fact are usually said to be unimpeachable unless they are wholly without evidential support. But there are cases in which errors have been held to deprive a tribunal of jurisdiction although they have not been characterised as errors of law. And errors of law within jurisdiction are generally unimpeachable except on appeal unless they are apparent on the record. Professor Schwartz might have asserted with greater justification that judicial review in England has been dominated, until very recently, by the distinction between errors within jurisdiction and errors going to jurisdiction.

Blemishes such as these do not seriously impair the value of the book as an introductory survey. Few others could have written it, and perhaps none could have written it so clearly.

S. A. de Smith.

THE INTER SE DOCTRINE OF COMMONWEALTH RELATIONS. Commonwealth Papers, No. V, published for the Institute of Commonwealth Studies. By J. E. S. FAWCETT. [London: The Athlone Press, University of London. 1958. 48 pp. 5s. 6d. net.]

THIS interesting pamphlet is the fifth in a series which began in 1954 (one paper being published each year), and is really an extended version of a lecture. The purpose of the author is to examine the nature of the so-called *inter se* doctrine in order to be able to decide whether it ever in fact existed, and, if it did, whether it is still of any significance. The doctrine has been said to govern the relations between politically self-governing, and now independent, countries within the Commonwealth, and provides that these relations are neither to be regarded as international or "foreign," nor to be governed by international law. It is also supposed to have rested upon the traditional constitutional principles of the unity and indivisibility of the Crown, and the common allegiance owed to it by its subjects throughout the Commonwealth. Mr. Fawcett examines the history of the capacity of various Commonwealth countries to enter into treaties or international agreements, a capacity not internationally recognised until after the First World War, when the Dominions and India appeared to become separate members of the League of Nations. He then discusses a number of treaties under which Imperial preference was entrenched. Separate diplomatic representation was rare before 1939, but is now generally practised, and the High Commissioners exchanged between Commonwealth members have acquired since 1948 a status akin to that of ambassadors. In *Kahan* v. *Federation of Pakistan* [1951] 2 K.B. 1003, the Secretary of State for Commonwealth Relations issued his certificate that Pakistan was an independent sovereign State; and the Kashmir question has been brought within the jurisdiction of the United Nations General Assembly. In sum, the author argues that the doctrine has never been a rule of customary international law, such international efficacy as it has enjoyed resting largely upon express treaty provisions; that it was in any case never accepted by all Commonwealth countries, and therefore cannot have been part of the general law of the Commonwealth; that it was in essence a constitutional convention, relied on principally by the United Kingdom, and probably of little significance since 1930; and that, since republics now exist within the Commonwealth, the unity and indivisibility of the Crown can no longer be invoked to construct a general law of the Commonwealth. The argument is closely reasoned, and makes stimulating reading, but the presence of so many trivial misprints in the text could surely have been avoided.

D. C. M. YARDLEY.

THE UNIVERSAL DECLARATION OF HUMAN RIGHTS. Its origins, significance, application and interpretation. By NEHEMIAH ROBINSON. [New York: Institute of Jewish Affairs, World Jewish Congress. 1958. xxii + 173 pp.]

THIS book is dedicated to the tenth anniversary of the adoption of the Universal Declaration of Human Rights. The Declaration, proclaimed by the General Assembly of the United Nations on December 10, 1948, has naturally inspired an extensive literature, and not the least of the many useful functions performed by this book is to provide a bibliographical guide to the many commentaries upon what Mrs. Franklin D. Roosevelt once called "a great event both in the life of the United Nations and in the life of mankind . . . an event comparable to the proclamation of the Declaration of the Rights of Man by the French people in 1789. . . ."

Writing ten years after this event, Mr. Robinson is somewhat less exuberant. He points out that, while the Declaration has not been without influence on international agreements, national constitutions and laws and the decisions of courts, there is now even less respect for human rights in the world than there was ten years ago. Even the attempt of the information agencies of the United Nations to make the origin and contents of the Declaration known to the peoples of the world has, it appears, been only partially successful. Fortunately, however, these facts have not caused Mr. Robinson to be cynical, or even unduly pessimistic. While he rightly warns against "the danger of non-legally-binding declarations breeding complacency," his main conclusion is that more than ten years are needed to achieve any real results in the fight against centuries-old hatreds and prejudices.

In fact, while the author makes a useful analysis of the Declaration article by article, the most interesting part of the book is that in which he discusses the significance of the Declaration as a whole. It is often said that the Declaration, which was adopted by the General Assembly by way of resolution only, has not the status of a treaty or convention and is not legally binding even on the States (of which there were 48) who voted for it, although it may have a considerable moral value. In the main Mr. Robinson agrees with this approach, although he has no difficulty in showing that it is altogether too superficial. One cannot, for instance, ignore the fact that some delegates seem to have had no doubt of the legal effect of the Declaration. The delegate of France referred to it as "an organic act of the United Nations having all the legal validity of such an act." The delegate of Mexico said of the Declaration that it "would define the human rights which States undertook to recognise," whilst the delegates of Chile and Uruguay contended that a violation of the Declaration would be tantamount to a violation of the Charter of the United Nations itself. Even if some of these statements are attributable to ill-considered rhetoric on the spur of the moment, the question remains of the extent to which governments may be bound by statements made on their behalf by duly appointed representatives at international meetings. Mr. Robinson does not broach this question, which is much in need of further elucidation. But, within the limitations of a small work, he deals admirably with the difficult problem of the legal and moral effect of the Declaration. He inclines to the view—which is not unlike the view expressed by Sir Hersch Lauterpacht in his Separate Opinion in the *Voting Procedure* case—that, while the Declaration does not bind States (even those who voted for it) to adapt their own laws immediately so as to accord with its principles, it has legal effect in the sense that Members of the United Nations, when legislating in the future in the field of human rights, are bound to take the principles of the Declaration into consideration. The distinction is somewhat subjective and imprecise, but, unless one takes the view that law and morality are entirely unrelated to one another, there is bound to be a vague and uncertain boundary between the two. Especially is this true when, as is the case with the recognition of human rights, international law is beginning to embrace within its scope an area of human relations which it has never attempted to regulate before. The author is, however, right in stressing that the advancement of human rights depends less upon the status of the Declaration than upon the climate of opinion. Given a favourable climate, a Declaration which is not legally binding may develop into a potent and universally recognised instrument; whereas, under unfavourable circumstances, it would not help much if all the provisions of the Declaration had been enacted in the form of a treaty.

D. H. N. Johnson.

Termination of Membership of International Organisations. By Nagendra Singh. [London: Stevens & Sons, Ltd. 1958. xv and 209 pp. 30s. net.]

A subject such as the termination of membership of international organisations, involving as it does vital legal and political significance, demands the exercise of considerable ability in its handling.

While the author conscientiously deals with all conceivable situations in which a State's membership of an organisation may be terminated, both by a State withdrawing its membership and by acts of suspension and expulsion of a State by the other members of the organisation, he is too content to skate over the surface and avoids a detailed discussion of the real legal and political issues involved. When he does engage on a discussion of a particular point he is content to expound the views of other text writers and to adapt his own views accordingly. So, for example, the view of Lauterpacht-Oppenheim, that, although the Charter does not specifically mention the right of withdrawal, the members of the UN must be deemed to have preserved this right (see Oppenheim, *International Law*, Vol. 1, 8th ed., pp. 411–412), Dr. Singh accepts without any great scientific analysis of the issues involved. He states that it is contrary to the practice of the WHO and UNESCO and gives a brief account of the practice of these organisations but makes no analysis of the legality of this practice and draws no conclusions other than those drawn before him.

The Lauterpacht-Oppenheim view is most sensibly based on the report of Committee 1/2 of the San Francisco Conference. So also Dr. Singh correctly bases his argument on this report but fails to make adequate use of the report. The Committee gave instances of where withdrawal might be inevitable, namely, where the Organisation was unable to maintain peace or could only do so at the sacrifice of law and justice or where a member found itself unable to concur in an amendment to the Charter. It is arguable that in the first case a member would be correct in maintaining that the purposes of the organisation having been completely frustrated its *raison d'être* had ceased to be and this would allow it to withdraw. In the second instance it would seem an automatic right that anyone who entered an organisation should be allowed to withdraw if that organisation decided to reconstitute itself. If this is the case then the position is no different from withdrawal from any law-making treaty of a non-organisational character.

This is not to suggest that there is no general right of withdrawal from the UN or any other international Organisation, but merely to point out some of the points which might and indeed should have been discussed in a work of this nature.

On the other hand the work has merits. It contains a very adequate comparison of the various terms of association which provide for the termination of membership. Here one might suggest the introduction of a treaty index list on the lines of the standard textbook statute index list would have been a great assistance to a casual reader.

By far the most vigorous section of the book is a discussion of the "termination" of the membership of the State of China whose people are now, in Dr. Singh's opinion, no longer represented in the UN. Thirty pages are devoted to a discussion of this problem. Dr. Singh's interpretations of the realities of this situation are original and most interesting. One can only regret that he has not applied himself with equal vigour to the other more fundamental legal problems with which he deals.

J. A. Andrews.

GREEN'S DEATH DUTIES. Fourth edition. By C. D. HARDING, LL.B. (Lond.) of the Estate Duty Office. [London: Butterworth & Co. (Publishers), Ltd. 1958. 1092 pp. 95s.]

THERE have been great changes in the law of death duties since the last edition of Green in 1952. For those practitioners who are acquainted with the previous editions no further recommendation is needed than that the present edition brings the book up to date to March, 1958, without changing its former character. Mr. Harding has avoided the two extremes, the one of stating the new law at such length and with such enthusiasm that old-established rules seem less important than they are, and the other of leaving the text much as it was and adding the new law as a kind of afterthought, by simply transcribing whole pages of the statute book. The reader of legal textbooks must be familiar with examples of both these practices. Mr. Harding has taken the middle course with some skill.

The result is a book which the reviewer finds difficult to criticise. One possible complaint is that it is becoming too big: its size could have been kept down had the chapters on Obsolescent Duties and Legacy and Succession Duty been wholly omitted. It can only be very rarely that anyone wishes to look up the law on these topics, and the former edition would surely do as well. The statutes dealing with legacy and succession duty could likewise have been omitted, while Appendices II and III, dealing with statutory instruments and repealed enactments, could perhaps have appeared in smaller type. The result would have been a more manageable and scarcely less useful book. Apart from this, the book retains the character of previous editions. In addition to giving the text of all relevant legislation, in the first Appendix, it gives an account of the law which, while omitting few points of importance, is not bettered for conciseness and lucidity by any other textbook on the subject. Moreover, although the editor is described as being "of the Estate Duty Office," the views expressed are by no means lacking in independence. On the other hand, the book expresses the law as it is, and does not go to extremes in criticising the many anomalies which exist. Nor does it cater primarily for the reader who desires to find ways of avoiding liability to duty. Nevertheless, the reader who thinks he has found a way of avoiding liability would be well advised to test it by reference to Green. To sum up, Green continues to be an objective and clear statement of one of the most difficult branches of the law.

D. C. POTTER.

THE CIVIL PRACTICE OF THE MAGISTRATES' COURTS IN SOUTH AFRICA. By JONES and BUCKLE. Sixth edition by the HON. MR. JUSTICE JOSEPH HERBSTEIN, P. W. E. BAKER, B.A., LL.B., Advocate of the Supreme Court of South Africa and S. AARON, B.A., LL.B., Advocate of the Supreme Court of South Africa. [Cape Town and Johannesburg: Juta & Co., Ltd. 1957. lxxiii and 964 pp. £7 7s. net.]

Jones and Buckle needs no commendation from a modern reviewer. Since the first edition, published in 1918, it has been a classic and no one who practises in the magistrates' courts would dream of being without it. The senior editor of the present edition, Mr. Justice Herbstein, has long shown a scientific interest in matters of procedure and is of course himself part author of a book on the civil practice of the superior courts. The care which has gone into the preparation of the present edition shows that he is as much master of the inferior as in the superior jurisdiction.

A. M. HONORÉ.